83 No. 439

In The

Supreme Court of the United States

October Term, 1983

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE J. GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife; FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single,

Petitioners,

-and-

HARMON COVE CONDOMINIUM II ASSOCIATION, INC.,
Intervenor,

vs.

HARTZ MOUNTAIN ASSOCIATES, a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

Background

It is not disputed that petitioners are contract purchaser unit owners of real estate condominium residential units, each with a percentage ownership interest in the appurtenant common elements, of a residential development, under the General New Jersey Condominium Real Estate Law (R.S. 46:8B-1 *et seq.*) which provides that such ownership is in fee simple [R.S. 46:8B-3(q)] and that each unit is a separate parcel of real property which may be dealt with by the owner ". . . in the same manner as is otherwise permitted by law for any other parcel of real property." (R.S. 46:8B-4).

Questions Presented

Does a construction of such statute by the New Jersey Supreme Court, whereby said unit owners are barred from suing their developer-seller for (a) specific performance of the contract of sale; (b) breach of contract; (c) breach of warranty; (d) negligent planning and construction of the common elements and resultant damages; (e) accounting, and reimbursement for monies expended to correct developer's deficiencies:

Question 1 — Impair the obligations of petitioner unit owners' contract rights, contrary to Article I, Section 10, Clause 1, of the United States Constitution?

Question 2. — Deprive petitioner unit owners of equal protection of the laws, contrary to the Fourteenth Amendment to the United States Constitution?

Question 3. — Deprive said petitioner unit owners of property and vested contract rights without due process

of law, contrary to the Fourteenth Amendment to the United States Constitution?

Question 4. — Decide questions of federal rights contrary to applicable decisions of the United States Supreme Court [Rule 17.1(c)]?

Question 5. — Decide questions of federal rights contrary to applicable decisions of courts of last resort in several states on the same subject matter [Rule 17.1(b)]?

ADDITIONAL PARTIES INVOLVED

1. Harmon Cove Condominium II Association, Inc. sought to intervene as a party plaintiff-intervenor but did not participate or file briefs but will be served with a copy of petition for writ of certiorari under Rule 19.6.

2. Pursuant to Rule 28.4(c) and 28 U.S.C. §2403(b) a copy of the petition for writ of certiorari will be served upon the Attorney General of the State of New Jersey.

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No.

In The

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The petitioners, Sidney Siller, *et al.*, pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above case on June 16, 1983.

OPINIONS BELOW

1. The opinion of the Superior Court of New Jersey, Chancery Division, dated July 29, 1981 is reported in 184 N.J. Super. 450 (1981).

2. The per curiam opinion of the Appellate Division of the Superior Court of New Jersey dated April 28, 1982 affirming the opinion below, is reported in 184 N.J. Super. 442 (1982).

3. The opinion of the Supreme Court of New Jersey dated June 16, 1983 is reported in 93 N.J. 370 (1983).

JURISDICTION

1. Summary judgment at the trial level of the Superior Court of New Jersey was entered August 7, 1981 dismissing Counts 1, 2, 3 and 5 of the complaint (20a).

2. The judgment was affirmed per curiam by the Appellate Division, Superior Court of New Jersey on April 28, 1982 without opinion (18a).

3. The judgment was modified and affirmed as to the real estate common elements by the Supreme Court of New Jersey, by judgment dated June 16, 1983, and this petition for writ of certiorari is filed within 90 days thereof (1a).

4. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 10, Clause 1 (in pertinent part):

> "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ."

United States Constitution, Fourteenth Amendment, Section 1 (in pertinent part):

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Jersey Revised Statutes (New Jersey Real Estate Condominium Law) R.S. 46:8B-1 to R.S. 46:8B-30:

Appears in Appendix, *infra* at 54a, *et seq.*

STATEMENT OF THE CASE

1. Respondent Hartz Mountain Associates was the owner and developer of the Harmon Cove I Complex in Secaucus, New Jersey, which consists of residential condominiums known as Harmon Cove Area I, Harmon Cove Area II and "common elements" including streets, marina, swimming pool, recreation building and related facilities.

2. Hartz Mountain filed a condominium deed, submitting the Harmon Cove Area I to the New Jersey Condominium Act, R.S. 46:8B-1, *et seq.*, and has done likewise with Harmon Cove

Area II; and the common recreation facilities for both areas I and II.

3. Hartz Mountain planned, designed, built and developed Harmon Cove I Condominium Area I, by building and selling individual residential townhouse condominium units to owners, including petitioners, and also planned, designed, built, developed and conveyed common elements, including a recreation area, a boardwalk area, landscaped areas, swimming pool, tennis courts, marina and related walks, streets, curbs and facilities, which common elements, by statute are associated with, and owned in proportionate parts, by the unit owners.

4. Hartz Mountain organized a non-profit association under said condominium law, to manage and administer the common elements relating to Harmon Cove Area I, known as the Harmon Cove I Condominium Association. At its inception, all the members thereof were owners, employees or nominees of Hartz Mountain.

5. Hartz Mountain Associates established a Recreation Association to manage and administer the joint recreation facilities in common for the joint benefit of the unit owners of Condominium Area I. At its inception, all the members thereof were owners, employees or nominees of Hartz Mountain.

6. Petitioners, individual unit owners in Condominium Area I have vital interests in the planning, design, construction and development of the townhouses, all of the common elements and all of the recreational facilities.

7. Allegations of breach of express and implied contract warranties, and negligent and defective planning, design, constructing, developing and conveying of said units and the common elements and related relief, have been made by the

petitioners against developer, Hartz Mountain, in this case on behalf of themselves, as individual owners, and on behalf of all others similarly situated in the class; namely, owners of condominium property in Area I and in Area II, which were planned, designed, built and developed by Hartz Mountain Associates, and which share the common elements, as well as the recreation facilities serving same. Serious settlement problems of the subsoil under both areas are involved, which could not be immediately known or discovered, and which petitioners allege are continuing, and which will get worse in the future, adversely affecting the value of all individual units, as well as the common elements and recreational facilities, associated therewith and a part thereof.

8. Under applicable statutes and private documents, developer Hartz Mountain established and controlled all said respondent associations for several critical years, and did not relinquish control until several years later (6a).

9. The Harmon Cove I Condominium Association and the Joint Recreation Association purported to settle all claims of all unit owners and interested persons against developer, Hartz Mountain, relating to all claims for deficiencies in individual units, as well as in the common elements.

10. Individual unit owners filed suit against developer for specific performance of real estate sales contracts; breach of contract; breach of warranty; accounting as to monies collected and spent to correct deficiencies; and to block "settlement of all claims" on the ground that only owners can decide such questions, since they own dwelling units and (by percentage ownership) the common elements.

11. Petitioners contend:

(a) that they have standing to sue Hartz Mountain Associates;

(b) for themselves as individual unit owners;

(c) as representatives of the class of unit owners of Harmon Cove Area I, and as to the common elements for all claims; and

(d) that the respondent associations have no jurisdiction, right or standing to (1) litigate, or (2) settle the case.

12. The New Jersey Supreme Court modified judgment of the lower courts but held, as to common elements, the non-profit association named to *maintain* and *administer* the common elements had exclusive rights to vindicate such rights.

13. Petitioners seek certiorari and contend that construing the statute thus (i) impairs their contract rights; (ii) discriminates against them as owners of real estate compared to other real estate owners; and (iii) deprives them of property rights without due process of law.

14. Petitioners seek certiorari.

HOW AND WHEN FEDERAL CONSTITUTIONAL QUESTIONS WERE PRESENTED AND DISPOSED OF

1. Petitioners raised the question of vested contract rights and property rights as real estate owners at the very inception of the case in the complaint (32a) alleging their right as property owners to protect their investment and to sue for specific performance of their contracts (32a); damages for breach of warranty and accounting (34a-36a), on all aspects, including the common elements they own, appurtenant to their home units.

2. When their standing was challenged at the Superior Court, Chancery Division (trial level), their initial brief (40a) emphasized

their right to sue as real estate owners equal to all other real estate owners; with vested owner rights (paragraphs 9 and 10). The brief urged that a purchaser-owner of real estate, their property and contract rights to sue for breach of contract and warranty had never been surrendered.

3. At oral argument (42a) it was reiterated that petitioners were owners of property rights, equal to all other owners of real estate (43a).

4. It was also urged that they had every right to vindicate their "contract property rights" (45a).

5. Throughout the argument the owners' vested property and contract rights were emphasized, and that the association had no authority to litigate or settle *their* contract claims.

6. The court did not deny that such rights existed, and could be vindicated against the developer, *but* construed the statute so as to vest *exclusive* authority in the association to do so, *on behalf* of the owners.

7. The court rejected petitioners' claims that (27a): ". . .assertion of substantial claims against the original developer-owner involves 'attributes of ownership and vindication of fundamental rights' " which are beyond the statute, master deed and by-laws.

8. Those "fundamental rights" urged were the equal protection of laws similar to all other real property owners; and the owner-contract property rights: above set forth, which are constitutionally protected, and were squarely raised and rejected.

9. When Counts 1, 2, 3, and 5 of the complaint were dismissed (seeking to sue the developer) petitioners appealed to

the Superior Court, Appellate Division. (Note: Petitioners were not allowed to sue the developer *at all,* at this stage.)

10. As the brief in the Appellate Division discloses (47a):

(a) The argument was repeated that petitioners had equal rights to sue, like all other real estate owners (paragraph 13, 47a);

(b) Breach of contract were owners' property rights (48a);

(c) It was reiterated by petitioners that condominium real property owners enjoyed their property the same ". . . as permitted by law for any other parcel of real property" (Point II, paragraph 2, 48a);

(d) The brief then urged that accordingly the petitioners ". . . have the right to protect their investment and its market value . . ." (and to litigate their rights, for all the relief sought in the complaint) (Point II, paragraph 3, 48a);

(e) The petitioners then squarely presented the federal question: (Point IV, paragraph 11) (49a):

> "Any other rule would deprive condominium property owners of property rights without due process of law."

(f) The Appellate Division affirmed without opinion.

11. Certification was sought and granted by the New Jersey Supreme Court.

12. Although facially the New Jersey Condominium Law *appears* to confer equal protection (R.S. 46:8B-4 — condominium owners accorded full rights ". . .permitted by law for any other parcel of real property") (R.S. 46:8B — unit owners own in "fee simple") actually the lower court had denied unit owners the right to sue for specific performance of their contract; breach of contract; breach of warranty, etc. — while *other* real estate owners did enjoy all such rights.

13. Petitioners accordingly raised the question in the petition for certification whether such construction (50a of petition) does ". . . discriminate against them as owners of real property in fee simple, and deprive them of property rights without legal protection and without due process of law. . . ." even though the statute R.S. 46:8B-4 purported to treat them equally, like any other owners of real property.

14. Petitioners urged that (51a) there ". . .is no basis in law for depriving contract owners in fee simple of their right, as real parties in interest, to sue developer for breach of contract; breach of warranty, etc. The role of the association is to 'administer and manage' the common elements, *not* usurp the independent property right of owners." (Emphasis in original.)

15. Petitioners urged (51a) that if the rights of contract owners to protect and vindicate their property rights were "transferred" to volunteer members of non-profit "associations" involuntarily, ". . .such construction would unlawfully discriminate against such condominium owners as a class of real estate owners — as opposed to *other* owners of real property. It would deprive condominium owners of valuable property rights, without due process of law."

16. It was urged (51a) this would damage the ". . .marketability and value of such condominium real estate. . ." which ". . .is a vested right in real estate. . . ."

17. It was expressly urged that (52a) ". . .the vested reports of such owners cannot be diminished, taken away or prejudiced without due process of law." and that "No cause is shown to discriminate against condominium real estate buyers in their right to sue for breach of contract . . . equal to the buyer-owners of *any other real estate*" (emphasis in original).

18. It could not be put more bluntly then was stated in paragraph 9, page 52a:

> "The Constitutions of the United States and of New Jersey prohibit such lack of due process; discrimination among those similarly situated; and lack of equal protection of the laws."

19. Paragraph 10, page 52a of said petition pointed out that "constitutional equal protection . . ." applies to courts as well as legislatures and paragraph 11 averred that "No rational basis or classification to bar plaintiffs as buyer-owners of real estate from sueing seller-developer appears." and such bar must fall (paragraph 11, 53a) ". . .as an unlawful deprival of vested property rights, without due process of law or equal protection of law."

20. The New Jersey Supreme Court did not deny such rights existed, but construed the statute as requiring the non-profit association to sue and vindicate such contract and ownership rights rather than the owners themselves.

21. Unlike the courts below, the Supreme Court recognized the due process-property argument to some extent, for it modified the judgment as to the residential units, and allowed partial suit against the developer as to those residential home units.

22. However, as to the common elements position, which are unequivocally and inextricably part of each condominium

property (R.S. 46:8B-6), it barred suit for specific performance or otherwise by owners, citing alleged "policy" considerations for having the association "represent" the owners (even against their will); yet allowing owners to proceed, if the association did not do so — in effect converting real estate owners to stockholders of a non-profit corporation only.

23. This runs contrary to the constitutional guarantees which do not permit the impairing of contract rights; or the taking of property rights without due process, on general grounds of "policy" or "convenience", or discrimination against condominium real estate owners, not equally applicable to *all* real estate owners as a class.

24. The Supreme Court tried to compromise, and fully recognized the right to sue the developer, but couched its response in a ruled procedure which bars owners from enforcing and enjoying their contract and property rights.

REASONS FOR GRANTING THE WRIT

I. State Action

Although facially the New Jersey Condominium Law appears to confer equality on condominium real estate owners with all owners of real estates (R.S. 46:8B-4), *as construed* by the New Jersey Supreme Court it deprives petitioners of contract and property rights and this becomes "state action" which cannot violate Article I, Section 10, Clause 1 (impair obligation of contract) or the Fourteenth Amendment (deny equal protection of laws or deprivation of property without due process) and binds courts as well as legislatures, even though supposedly resting on state grounds. *Bandini v. Superior Ct.*, 284 U.S. 8 at 18, 52 S. Ct. 103, 73 L. Ed. 130 (1931); citing *Lindsley v. Natural Carbonic Gas,* 220 U.S. 61, 73; *Coombes v. Getz,* 2850 S. 434, 52 S.Ct. 435, 76 L. Ed. 866 (1932); *Columbia Railway v. South Carolina,*

261 U.S. 236, 67 L. Ed. 629; *General Motors v. Washington,* 377 U.S. 436, 84 S.Ct. 1564, 12 L. Ed. 2d 430 (1964); *Demorest v. City Bank,* 321 U.S. 36, 64 S. Ct. 384, 88 L. Ed. 526 (1943); *Shelley v. Kraemer,* 334 U.S. 1, 92 L. Ed. 1161 (1947); *Standard Oil v. Johnson,* 316 U.S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611 (1942); *Williams v. Bruffy,* 102 U.S. 248, 26 L. Ed. 135 (1880).

The remedy is certiorari. *Rooker v. Fidelity Trust,* 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *Bricker v. Crane,* 468 F. 2d 1228, *cert. denied,* 410 U.S. 930 (C.A. 5, 1972).

In such cases, the construction of the highest state court as to the meaning and application of the state statute is accepted, and tested as against constitutional standards as applied. *Hanover Ins. Co. v. Harding,* 272 U.S. 494, 47 S. Ct. 179, 71 L. Ed. 372 (1926).

II. Raising Federal Question

No particular formal language is needed to raise federal constitutional rights, as was done in this case, and their denial is reviewable on certiorari. *Huffman v. Pursue,* 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975).

So long as federal rights were urged ". . . with fair precision and in due time . . ." for the court to rule thereon, denial is reviewable.

> "And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Naming the constitutional section or some special form of words is not necessary. *Street v. New York,* 394 U.S. 576, 89 S. Ct.

1354, 22 L. Ed. 2d 572 (1969); *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965).

In considering the action complained of as denying federal rights, the United States Supreme Court must determine the effect of the action taken and is not bound by local determinations that such action is merely a matter of local procedure or a rule of evidence or the like. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 2d 254 (1921).

It will look to substance and effect, rather than form. *Dept. of Revenue (Ky.) v. Beam Distilling*, 377 U.S. 341, 84 S. Ct. 1247, 12 L. Ed. 2d 362 (1964); *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 at p. 591 (1963). And it must ultimately decide what is due process. Even Congress, much less a state court, ". . .does not have the final say as to what constitutes due process under the Fourteenth Amendment." *State Bd. Insurance v. Todd Shipyards*, 370 U.S. 451, 82 S.Ct. 1380, 8 L. Ed. 2d 620 (1962).

Proper presentation of the federal questions is itself a federal question. *Wright v. Georgia*, 373 U.S. 284, 289-291, 10 L. Ed. 349, 354, 83 S. Ct. 1240.

It is submitted the federal constitutional rights were urged and considered during the entire case, at all levels.

III. Impairment of Contract

It is fundamental that competent persons

> ". . . shall have the utmost liberty of contracting . . . "

and contracts fairly made

". . .shall be held valid and enforced in the courts." *Twin City Pipeline Co. v. Harding Glass,* 283 U.S. 353, 75 L. Ed. 1112 (1931).

Interference with the right to contract should occur only in exceptional circumstances. *Adkins v. Children's Hospital,* 261 U.S. 525, 67 L. Ed. 78 (1923) and is protected by *both* the contract clause (Article I, Section 10, Clause 1) and the due process clause of the Fourteenth Amendment. *Bayside Fish Flour Co. v. Gentry,* 299 U.S. 422, 80 L. Ed. 772 (1936); *Irving Trust v. Day,* 314 U.S. 556, 86 L. Ed. 453 (1942). *Note:* the *Adkins* case was overruled for a minimum wage law. *West Coast Hotel v. Parrish,* 300 U.S. 400, 81 L. Ed. 713, 57 Sup. Ct. 586 (1937).

Without enforcement rights in the courts, contract rights have little substance or value and the "obligation" of contracts which states may not impair under Article I, Section 10, Clause 1 is precisely the enforcement or remedy. When that is diluted or taken away, contract rights are unlawfully impaired. *Louisana v. Police Jury,* 111 U.S. 716, 28 L. Ed. 574 (1884); *Worthen v. Kavanaugh,* 295 U.S. 56, 79 L. Ed. 1298 (1935).

Not to impair contracts is one of the strictest duties placed on the states by the United States Constitution. *Murray v. City Council, Charleston,* 24 L. Ed. 760, 96 U.S. 432 (1878), and the provision applies to all contracts ". . .executory and executed contracts, by whomsoever made." *Farrington v. Tennessee,* 95 U.S. 679, 24 L. Ed. 558 (1878).

The prohibition is universal and concerns the *effect* of state action as ". . .impairing the rights resting on contract" whether it permits deviation from contract terms of dispensing with performance, however minute. *Columbia Railway v. South Carolina,* 261 U.S. 236, 67 L. Ed. 629.

This applies to contracts with the state or with third persons based on statutory rights. *Combes v. Getz*, 285 U.S. 434, 76 L. Ed. 866, 52 S. Ct. 435 (1932).

Finally, it is *not* a matter of degree. Unless there is lawful cause, contracts cannot be impaired at all. *Ohio State Life Ins. Co. v. Clark*, 274 F. 2d 771, *cert. denied*, 80 S.Ct. 1599, 363 U.S. 828, 42 L. Ed. 2d, 523; *Farrington v. Tennessee*, 95 U.S. 679, 24 L. Ed. 558 (1878).

Vested causes of action are property rights constitutionally protected. *Pritchard v. Norton*, 106 U.S. 124, 137, 27 L. Ed. 104, 1 S. Ct. 102.

It is true that redress to courts may be controlled, moderately postponed, have uniform conditions attached, and the like, so long as the ". . .right to redress by some effective procedure" is preserved. *Giffes v. Zimmerman*, 290 U.S. 326, 78 L. Ed. 342 (1933).

What was done here was to totally *eliminate* redress to the courts by petitioners to vindicate their contract and property rights as real estate contract buyers against contract sellers, "giving" such rights to another entity, and depriving petitioners of the ". . . right to resort to the appropriate courts for redress" *Bowman v. Lewis*, 101 U.S. 22, 25 L. Ed. 989 (1880).

This contravenes their right to

> ". . .acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. . ." *Cotting v. Godard*, 183 U.S. 78, 46 L. Ed. 92 (1900).

IV. Denial of Equal Protection of Laws

Under the Fourteenth Amendment even "police powers" cannot deprive citizens of constitutional rights; and reasonable controls must be fairly and equally applied, including equal access to the courts to protect property and enforce contracts. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 539, 46 L. Ed. 679 (1902). *Note:* The *Connolly* case was modified to allow partial exceptions in anti-trust cases. *Tigner v. Texas*, 310 U.S. 144, 84 L. Ed. 1126, 60 Sup. Ct. 880 (1940).

Here precisely the opposite happened. The right to sue developer to enforce on all real estate sale obligations was expressly recognized, but taken away from petitioner contract owners, and "given" to another entity (not an owner, not a contractor) for supposed "policy" or "convenience" reasons, and only condominium real estate owners singled out for such unequal treatment.

Control of access, designation of legal forums etc. are lawful, so long as ultimately

> ". . . fundamental rights are equally protected and preserved." *Cincinnati Street Railway v. Snell*, 193 U.S. 30, 48 L. Ed. 604 (1904).

This flies directly in the face of the requirement that ". . . all persons similarly circumstanced shall be treated alike." *Hartford Steamboiler Co. v. Harrison*, 301 U.S. 459, 81 L. Ed. 1223 (1937) which applies to

> ". . . all the powers of the state which can affect the individual or his property." (p. 1226).

A ". . . mere difference . . ." is not enough for unequal treatment, there must be a valid reason for some dissatisfaction resulting in unequal treatment (p. 1226).

Such unequal treatment cannot be conjectural or unreasonable. *Borden's Farm Products v. Baldwin,* 293 U.S. 194, 79 L. Ed. 281, 55 S. Ct. 87. Merely citing "public health" or some label is not sufficient. *Adkins v. Children's Hospital,* 261 U.S. 525, 67 L. Ed. 185 (1923).

Discriminatory treatment offends equal protection of the laws. *Wheeling Steel v. Glander,* 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544 (1948) for

> ". . . equal protection to all is the basic principle upon which justice under law rests." *Pierre v. Louisiana,* 306 U.S. 354, 83 L. Ed. 757, 59 Sup. Ct. 536 (1939).

Absent some real "emergency" such as rent control, applied to all real estate owners *equally* or urban redevelopment related to public welfare or the like, *Berman v. Parker,* 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) (and applying eminent domain principles in proper cases) property rights may not be taken on an unequal basis.

That is the case here, where purely private real estate ownership contract and property rights are involved, and the court construes the statute to deny *only* to condominium real estate owners the right to enforce their contracts, "giving" them to another entity (the association designed to *maintain* common elements, not sue on antecedent contracts of purchase) where the residential units *and* the common elements both belong to petitioners under R.S. 46:8B-6 in fee simple [R.S. 46:8B-3(q)].

There is no reasonable ground for treating condominium real estate owners differently in such circumstances from all other real estate owners, and the constitutional guarantees of equal protection should be construed ". . . liberally. . ." to protect personal and property rights.

It is not enough that "classification" is attempted (here by the court, not by the legislature) but it must be reasonable, based on some palpable and just reason or ground. *Gulf, Colorado & Santa Fe Railroad v. Ellis,* 165 U.S. 50, 41 L. Ed. 666 (1896); *Allied Stores, Ohio v. Bowers,* 358 U.S. 522, 3 L. Ed. 2d 480 (1958).

It is submitted such reasonable ground or basis is lacking. The court speaks (10a) of convenience, greater efficiency, less cost etc. but those matters are the concern or problem of the owners of the contract enforcement rights, and no ground for *taking away* their property and contract enforcement remedies in such discriminatory and unequal fashion and the judgment should be reversed, it is submitted.

V. Deprivations of Property Without Due Process

Petitioners sought specific performance to enforce contract rights, and to establish breach of contract; breach of warranty; accounting; to protect their property and investment, recoup damage to marketability; resale values, etc. of their condominium real estate property.

Depriving them of access to the courts to enforce and vindicate such rights also deprives them of property without *due process* of law aside from denial of equal protection, which is a different right. *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422, 80 L. Ed. 722 (1936); *Truax v. Corrigan,* 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921); *Connolly v. Union Sewer Pipe Co.,* 184 U.S.

539, 46 L. Ed. 679 (1902); *Barbier v. Connolly*, 113 U.S. 27, 31, 28 L. Ed. 923, 924, 5 S. Ct. 357, 359; *Bowman v. Lewis*, 101 U.S. 22, 25 L. Ed. 989.

Action may also impair contracts and offend the due process clause, which are also different rights. *Irving Trust v. Day*, 314 U.S. 556, 86 L. Ed. 453 (1942).

It is submitted taking away their right to enforce their rights, takes their property without due process.

In sum, the right of the association for "administration and management" of common elements, once *lawfully delivered pursuant* to contract, has been expanded to the enforcement of the original contract, claimed to have been *breached* and not performed, which *antedated* delivery, to the detriment of contract owners who own the property, the common elements and the contract, the enjoyment and enforcement of which they cannot be deprived of without just compensation or appropriate due process of law.

VI. The Decision of the New Jersey Supreme Court Goes Contrary to the Decisions of Courts of Last Resort in Many States that Have Passed on Similar Questions, and Requires Review Under Rule 17.1(b).

Various courts of last resort in several states have passed on the same question (rights of unit owners to sue developer on contract for non-performance; breach of warranty, etc. as to residential units *and* as to common elements appurtenant thereto) and have uniformly upheld their contract and property rights relating thereto, such as:

1. (CALIFORNIA) *Friendly Village v. Silva & Hill Const. Co.*, 31 Cal. App. 3d 220, 107 Cal. Reptr. 123 (1973) held that

owners, not condominium association, have right to sue as party in interest.

2. (FLORIDA) *Rubenstein v. Burleigh*, 305 So. 2d 311, 313 (Fla. 3d D.C.A. 1975) held that *owners*, not condominium associations, have standing to sue.

See also, Imperial Towers Condo v. Brown, 338 So. 2d 1081 (Fla. 4th D.C.A. 1976) held that even *after* statute amended, condominium association could only sue as to common elements; *Avila South Condo Ass'n v. Kappa*, 347 So. 2d 599 (1976) held that statute found to be *invalid*, as trenching on judicial power to determine standing, which requires a *court rule* to confer standing on condominium association, *The Florida Bar*, 353 So. 2d 45 (1977).

3. Even *after* amendment of court rule, standing of *owners* not diminished; *The Florida Bar, supra* at 608.

4. (NEVADA) *Nevada I.C. Deal v. 999 Lake Shore Ass'n*, 94 Nev. Adv. Sh. 87, 579 P. 2d 775 (1978) at p. 77 held that only *owners* ". . . have standing to sue for construction or design defects to the common areas. . ." Only they eventually bear costs, and are the real parties in interest.

5. (CONNECTICUT) *Governor's Grove v. Hill Development*, 35 Conn. Sup. 199, 404 A. 2d 131 (1979) held that only *owners* can maintain action against developer before *statute* expressly allows condominium association to sue *on behalf* of owners as real parties in interest.

(CONNECTICUT) *Doyle v. A. P. Realty*, 36 Conn. Rep. 126, 414 A. 2d 204 (1980) held that even *after* such statute, both association *and* owners can sue developer.

Semble: *Greentree v. RSP Corp.* (cited by the court below in this case) 36 Conn. Sup. 160, 415 A. 2d 2481 (1980) held that both ass'n *and* owners have standing to sue.

6. (COLORADO) *Ireland v. Wynkoop*, 539 P. 2d 1349 (Colo. App. 1975) where the court distinguished between *association contracts* where association had privity and could sue; and (p. 1359) claim of owners on their *purchase agreements*, which remain *owner's* claims on which only they could proceed.

7. (MAINE) *Goldenfarb v. Land Design*, 409 A. 2d 662 (Maine 1979) where suit by *owners* on breach of warranty (parking) was upheld. Award made to *each owner*, though condominium association existed, assigned parking, etc.

8. (NEW YORK) *Bd. Managers of Woodgate Village v. Kaufman*, ____ N.Y. Misc. 2d ____, ____ N.Y.S. 2d ____ (Sup. 1976) held that condominium association could sue because of a *special statute* allowing it to sue ". . . on behalf of two or more unit owners. . . ", and distinguished the otherwise persuasive California case of *Friendly Village, supra*, because California then had no such statute. (Other cases are cited in the briefs.)

In Florida and Connecticut, even amendments allowing associations to sue as to common elements do *not* bar owners; and in New York the statute was not used in the case cited to *bar* owners, but to allow association to sue a third party.

The concept of condominium real estate ownership is so important and widespread, and involves varied and extensive contract and property rights federally protected; involving now millions of dollars and commercial, recreational and business applications, as well as residences, that the federal contract and property rights involved should be uniformly treated, protected and upheld, it is submitted.

Accordingly, an anomalous decision involving those federal rights (impairment of contract; equal protection; holding and vindicating property rights under due process) such as was rendered in this case, should be reviewed and corrected, it is submitted.

CONCLUSION

For these reasons, petitioners submit the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN TOMASIN
Attorney for Petitioners

OPINION OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
A-72 September Term 1982

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE J. GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife; FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single,

Plaintiffs-Appellants,

and

HARMON COVE CONDOMINIUM II ASSOCIATION, INC.,

Plaintiff-Intervenor,

v.

HARTZ MOUNTAIN ASSOCIATES, a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Defendants-Respondents.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 184 *N.J. Super.* 442 (1982).

Argued February 8, 1983 — Decided June 16, 1983

John Tomasin argued the cause for appellants.

Opinion of the Supreme Court of New Jersey

Jerome A. Vogel argued the cause for respondent Hartz Mountain Associates, etc. (*Jeffer, Hopkinson & Vogel,* attorneys).

Richard S. Miller argued the cause for respondents Harmon Cove I Condominium Association, Inc., etc., et al. (*Williams, Caliri, Miller & Otley,* attorneys).

The opinion of the Court was delivered by

SCHREIBER, J.

We are called upon in this case to consider certain aspects of the Condominium Act, *N.J.S.A.* 46:8B-1 through 38, in particular those concerning the relationship of the owner of a unit to the associations representing all unit owners with respect to claims against the builder of the condominium. Plaintiffs, owners and inhabitants of housing units in the condominium community "Harmon Cove" in Secaucus, New Jersey, sued the developer, Hartz Mountain Associates (Developer), and the unit owner associations, Harmon Cove I Condominium Association, Inc. (Association), and Harmon Cove Recreation Association, Inc. (Recreation Association) (collectively the Associations). The suit related to alleged defects in and about the units and common areas and facilities and to a settlement that the two associations were prepared to effectuate on behalf of all unit owners, including plaintiffs, with the Developer.

The plaintiffs, as individual unit owners and on behalf of others similarly situated, had instituted the suit by filing a verified complaint and an order to show cause, in which they sought temporary restraints to prevent consummation of the settlement between the Developer and the Associations. The trial court denied any temporary restraints, signed an order directing the parties to file briefs "as to the standing of plaintiffs to bring this action"

and set a date for a hearing on the standing issue. In addition to the briefs, the plaintiffs submitted an affidavit of one unit owner with copies of various documents including the master deed. Defendant Hartz Mountain also submitted a certificate of the director of its residential department with certain attachments and the defendant Association submitted a certified statement of its president with certain attachments.[1] The parties and the trial court considered the matter as if defendants had filed a motion for summary judgment on the ground that plaintiffs lacked standing to institute and maintain the action.

The trial court dismissed the complaint against the Developer and permitted the defendants to consummate the settlement at their own risk. It sustained part of one count of plaintiff's complaint against the Associations. 184 *N.J. Super.* 450 (Ch. Div. 1981). Plaintiffs appealed and the Appellate Division affirmed. 184 *N.J. Super.* 442 (1982). We granted plaintiffs' petition for certification. ____*N.J.*____ (1982).

The complaint contained five counts. The first, second, third and fifth counts were directed solely against the Developer. Generally they asserted that the Developer had planned and built the condominium known as Harmon Cove I in Secaucus and had sold units to the five plaintiffs. They alleged that the condominiums and the common elements had numerous defects and deficiencies, all attributable to the Developer. The complaint specified improper insulation of the individual units; inadequate caulking of windows and doors; improper heating system; inadequate driveways and sound insulation; defects in the marina dock area, swimming pool,

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1. The trial court had not examined the defendants' certificates at the time of oral argument because they were submitted shortly before the hearing. It undoubtedly considered them before filing its written opinion.

and boardwalk; and soil settlement problems throughout the entire development. It is important to note that, though most complaints in these counts pertained to the common elements and areas, some related to the individual units. The trial court dismissed these four counts (first, second, third and fifth) with prejudice.

The fourth count, directed solely against the Associations, alleged that settlement negotiations between the Association, the Recreation Association[2] and the Developer with respect to claims arising from the design and building of the "condominiums and the common elements" were near completion. The trial court sustained that part of the fourth count[3] that challenged the actions taken by both Associations on procedural and substantive grounds and permitted the plaintiffs to amend the complaint to express this clearly. This count, as subsequently amended by plaintiffs, charged that the proposed settlement was unreasonable, unlawful, and inadequate, that the Associations had breached their fiduciary duties and responsibilities to plaintiffs, and that the Developer, which at one time properly controlled the Associations, had continued unlawfully to exercise control and influence over the Associations. Moreover, the plaintiffs asserted that the Associations and the Developer were settling claims pertaining to the individual units as well as the common elements.

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2. The Association, composed of all unit owners, managed the condominium property. The Recreation Association, also composed of all unit owners, managed the common recreation facilities.

3. The original fourth count also charged that the Association had no authority to settle the claims against the Developer.

I

The Legislature recognized a new form of ownership of real property in enacting the Condominium Act.[4] *N.J.S.A.* 46:8B-1 through -38. The Act requires the developer to execute and file a master deed describing the land, identifying the units, defining the common elements, and providing for an association of unit owners. The condominium property consists of the land and all improvements. *N.J.S.A.* 46:8B-3(i). The individual condominium purchaser owns his unit together with an undivided interest in common elements. Each unit is a separate parcel of real property which the owner may deal with "in the same manner as is otherwise permitted by law for any parcel of real property." *N.J.S.A.* 46:8B-4. The result is that the unit owner, having a fee simple title, enjoys exclusive ownership of his individual apartment or unit, while retaining an undivided interest as a tenant in common in the common facilities and grounds used by all the residents. Kerr, "Condominium--Statutory Implementation," 38 *St. Johns L. Rev.* 1, 2 (1963); Berger, "Condominium: Shelter on a Statutory Foundation," 63 *Colum. L. Rev.* 987, 989 (1963); 15A *Am. Jur.* 2d, *Condominiums and Cooperative Apartments*, §1.

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4. The history of condominiums has been traced back to ancient Rome, Note, "Land Without Earth--Condominium," 15 *U. of Fla. L. Rev.* 203, 205 (1962), though this has been disputed, Berger, "Condominium: Shelter on a Statutory Foundation," 63 *Colum. L. Rev.* 987, 987 n. 5 (1963). Others contend that the concept can be traced back to the ancient Hebrews in the Fifth Century B.C., Kerr, "Condominium--Statutory Implementation," 38 *St. Johns L. Rev.* 1, 3 (1963); Note, "The FHA Condominium," 31 *Geo. Wash. L. Rev.* 1014, 1015 (1963). There is recognition of the concept in common law. *Coke on Littleton*, quoted in Ball, "Division in Horizontal Strata of the Landscape Above the Surface," 39 *Yale L.J.* 616, 621 (1930).

The Act also provides that the condominium will be administered and managed by the association. *N.J.S.A.* 46:8B-3(b); 46:8B-12. The business form of the association is unrestricted. *N.J.S.A.* 46:8B-12. The developer initially controls the association. When 25% of the units have been sold, the unit owners are entitled to elect at least 25% of the association's governing body. *N.J.S.A.* 46:8B-12.1(a). The unit owners' authority is increased to 40% when half of the units have been sold. When the unit owners own 75%, they are entitled to elect all the members of the governing body. *N.J.S.A.* 46:8B-12.1(a).[5] Once that occurs, the developer is required to "relinquish control of the association." *N.J.S.A.* 46:8B-12.1(d).

The association is charged with the "maintenance, repair, replacement, cleaning and sanitation of the common elements." *N.J.S.A.* 46:8B-14(a). The common elements are defined as follows:

> "Common elements" means:
> (i) the land described in the master deed;
> (ii) as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies,

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5. The developer can retain one representative on the governing body in certain circumstances.

> Notwithstanding any of the provisions of subsection a of this section, the developer shall be entitled to elect at least one member of the governing board or other form of administration of an association as long as the developer holds for sale in the ordinary course of business one or more units in a condominium operated by the association. [*N.J.S.A.* 46:8B-12.1(a)]

stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units;

(iii) yards, gardens, walkways, parking areas and driveways, excluding any specifically reserved or limited to a particular unit or group of units;

(iv) portions of the land or any improvement or appurtenance reserved exclusively for the management, operation or maintenance of the common elements or of the condominium property;

(v) installations of all central services and utilities;

(vii) all other elements of any improvement necessary or convenient to the existence, management, operation, maintenance and safety of the condominium property or normally in common use; and

(viii) such other elements and facilities as are designated in the master deed as common elements. [*N.J.S.A.* 46:8B-3(d)]

It should be noted that under subsection (d)(viii) above, the common elements may be expanded to include other "elements and facilities" designated in the master deed. The association has a right of access to each unit "as may be necessary for the maintenance, repair or replacement of any common elements therein or accessible therefrom." *N.J.S.A.* 46:8B-15(b).

The association is empowered to assess and collect funds from unit owners for common expenses, to maintain accounting records, and to obtain insurance against loss by fire or other casualties damaging the common elements and all structural portions of the condominium property. *N.J.S.A.* 46:8B-14(b), (d) and (g).

The statute authorizes the association to "enter into contracts, bring suit and be sued." *N.J.S.A.* 46:8B-15(a).[6] No unit owner, except as an officer of the association, may bind the association. *N.J.S.A.* 46:8B-16(a). Nor may a unit owner "contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions thereto, except through the association and its officers." *N.J.S.A.* 46:8B-18. If a unit owner fails to comply with the rules and regulations or any of the provisions in the master deed, he may be subject to a suit for injunctive relief by the association or by any other unit owner. *N.J.S.A.* 46:8B-16(b).

II

All parties agree that the clear import, express and implied, of the statutory scheme is that the association may sue third parties for damages to the common elements, collect the funds when successful, and apply the proceeds for repair of the property. The statutory provisions empowering the association to sue, imposing the duty on it to repair, and authorizing it to charge and collect "common expenses,"[7] coupled with the prohibition against a unit

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6. In this case the Association is a nonprofit corporation. As such it may, under the terms of *N.J.S.A.* 15:1-4(b), "sue and be sued, complain and defend in any court" any action. Unincorporated associations consisting of seven or more persons may sue or be sued "in any civil action affecting [the unincorporated association's] common property, rights and liabilities." *N.J.S.A.* 2A:64-1.

7. Common expenses are defined as "expenses for which the unit owners are proportionately liable, including but not limited to:

> (i) all expenses of administration, maintenance, repair and replacement of the common elements;
>
> (ii) expenses agreed upon as common by all unit owners; and

(Cont'd)

owner performing any such work on common elements, are compelling indicia that the association may institute legal action on behalf of the unit owners for damages to common elements caused by third persons.

In the absence of any statutory plan, we have acknowledged the standing of an association of tenants in an apartment building to sue their landlord. *Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y.*, 58 *N.J.* 98 (1971). The plaintiff tenant association in *Crescent Park* was a nonprofit organization composed of tenants of a high-rise luxury apartment building. It charged the landlord with responsibility for defects in various parts of the common elements, such as the air conditioning system, elevators, laundry rooms and swimming pool. The complaint was dismissed on the ground that the plaintiff had no standing. Justice Jacobs, writing on behalf of this Court, reversed. He observed that the individual tenants could have brought such a suit and that by acting together their bargaining power was enhanced. *Id.* at 108. He noted that the complaint was

> confined strictly to matters of common interest and [did] not include any individual grievance which might perhaps be dealt with more appropriately in a proceeding between the individual tenant and the landlord. So far as common grievances are

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(Cont'd)

> (iii) expenses declared common by provisions of this act or by the master deed or by the bylaws." [*N.J.S.A.* 46:8B-3(e)]

It has been held that an association by virtue of its assessment power may include the litigation costs as a common expense. *See Margate Village Condominium Ass'n, Inc. v. Wilfred, Inc.*, 350 So. 2d 16, 17 (Fla. App. 1977) (upholding association's right to assess all owners, including developer, for litigation expenses, including those of an action against developer).

> concerned they may readily and indeed more appropriately be dealt with in a proceeding between the Association, on the one hand, and the landlord, on the other, thus incidentally avoiding the procedural burdens accompanying multiple party litigation." [*Id.* at 109]

Justice Jacobs concluded that "it [was] difficult to conceive of any policy consideration or any consideration of justice which would fairly preclude the Association from maintaining, on behalf of its member tenants, the present proceeding between itself as plaintiff and the landlord and its parent company as defendants." *Id. See, e.g., Piscataway Apt. Assoc. v. Tp. of Piscataway*, 66 *N.J.* 106 (1974) (nonprofit association of apartment house owners maintained action).

We find nothing in the legislative scheme governing condominiums to indicate policy considerations different from those expressed in *Crescent Park*. Avoidance of a multiplicity of suits, economic savings incident to one trial, elimination of contradictory adjudications, expedition in resolution of controversies, accomplishment of repairs, and the positive effect on judicial administration are supportive policy reasons.[8] Moreover, the financial burden on an individual owner may be so great and so disproportionate to his potential recovery that he could not or would not proceed with litigation. Other jurisdictions have also interpreted their statutes governing

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8. The plaintiffs, though not addressing the issue squarely, have implicitly indicated that the Legislature would have no authority to determine whether associations would have a right to sue because this is "procedural" and exclusively within the jurisdiction of the Supreme Court. *Winberry v. Salisbury*, 5 *N.J.* 240, 255 (1950). It is not necessary for us to address that question since we are in full agreement with the policy expressed.

condominiums to authorize unit owner associations to sue with respect to claims pertaining to common elements.[9] *1000 Grandview Ass'n v. Mt. Washington Associates*, 434 *A*.2d 796 (Pa. Super. Ct. 1981); *Governors Grove Condominium Ass'n, Inc. v. Hill Development Corp.*, 404 *A*.2d 131, 134 (Conn. Super. Ct. 1979); see also *Avila South Condominium Ass'n v. Kappa Corp.*, 347 *So*. 2d 599, 607-609 (Fla. Sup. Ct. 1979), in which the Florida Supreme Court held that the legislature did not have authority to empower the association to sue, but accomplished the same effect by promulgating a court rule. *Contra, Deal v. 999 Lakeshore Ass'n*, 579 *P*.2d 775, 777-78 (Nev. 1978) (dictum); *Friendly Village Community Ass'n, Inc. v. Silva & Hill Constr. Co.*, 31 *Cal. App.* 3d 220, 225, 107 *Cal. Rptr.* 123, 126, 69 *A.L.R.*3d 1142, 1146 (1973). *See generally* Annot., "Standing to bring act relating to real property of condominiums," 72 *A.L.R.*3d 314 (1976); Annot., "Proper party plaintiff in action for injury to common areas of condominium development," 69 *A.L.R.*3d 1148 (1976); Note, "Condominium Class Actions," 48 *St. Johns L. Rev.* 1168, 1180-81 (1974).

III

If, as we have held, the association may sue to protect the rights and interests of the unit owners in the common elemens, does it have the exclusive right to maintain those actions? Obviously, the unit owner has an interest in claims against the developer arising out of damages to or defects in the common elements. However, the association has been charged with and

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9. Many condominium statutes were modeled after the Federal Housing Administration's Model Statute for the Creation of Apartment Ownership, which acknowledges the right of the association to sue on behalf of the unit owner. *See* §7 of FHA Model Statute reprinted in Rohan and Reskin, 1A *Condominium Law & Practice*, Appendix B-3.

delegated the primary responsibility to protect those interests. "The association . . . shall be responsible for the . . . maintenance, repair, replacement, cleaning, and sanitation of the common elements." *N.J.S.A.* 46:8B-14. So long as it carries out those functions and duties, the unit owners may not pursue individual claims for damages to or defects in the common elements predicated upon their tenant in common interest. The Condominium Act contemplates as much. The association, not the individual unit owner, may maintain and repair the common elements. "No unit owner shall contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions thereto, except through the association and its officers." *N.J.S.A.* 46:8B-18. Indeed the statute authorizes the association to assess the membership to raise those funds designated as "common expenses." *N.J.S.A.* 46:8B-3(e). "A unit owner [is], by acceptance of title . . . conclusively presumed to have agreed to pay his proportionate share of common expenses." *N.J.S.A.* 46:8B-17.

It would be impractical indeed to sanction lawsuits by individual unit owners in which their damages would represent but a fraction of the whole. If the individual owner were permitted to prosecute claims regarding common elements, any recovery equitably would have to be transmitted to the association to pay for repairs and replacements. A sensible reading of the statute leads to the conclusion that such causes of action belong exclusively to the association, which, unlike the individual unit owner, may apply the funds recovered on behalf of all the owners of the common elements. See W. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 105 (1981), suggesting that only association be permitted to maintain action.

This is not to say that a unit owner may not act on a common element claim upon the association's failure to do so. In that event

the unit owner's claim should be considered derivative in nature and the association must be named as a party. Rule 4:32-5 would be applicable. That Rule governs actions "brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it."

The unit owner may also sue the developer on behalf of the association irrespective of its governing board's willingness to sue during the period of time that the association remains under the control of the developer. The inherent conflict of interest is such that the association would not be in a position to resolve conflicts with the developer in the absence of the approval of the unit owners, other than the developer.[10] *See Berman v. Gurwicz*, No. C-4576-74 (Ch. Div. 1981), aff'd o.b., No. A-3821-81-T2 (App. Div. 1983), certif. denied, ____*N.J.*____ (1983). In this situation the procedure of *R.* 4:32-5 would also appear to be appropriate.

The unit owner, of course, does have primary rights to safeguard his interests in the unit he owns. *N.J.S.A.* 48:8B-4.[11] The physical extent of that property depends upon what has been included in the common elements. This may be ascertained by

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10. A similar concern about overreaching by the developer led the Legislature to establish a rebuttable presumption of unconscionability of leases not executed by representatives of condominium unit owners other than the developer. *N.J.S.A.* 46:8B-32(a). Rebuttable presumptions of unconscionability also apply to numerous provisions that may be found in "leases involving condominium property, including . . . recreational or other common facilities or areas." *N.J.S.A.* 46:8B-32.

11. This is expressly recognized in the instant case in the Association's by-laws. Art. 6, § 3, p. 75.

examination of the statutory definition and the master deed. Moreover, defective conditions in the common elements may also result in injury to the unit owner and damages to his personal property and the unit. For example, a faulty roof may result in personal property damage in the unit. The unit owner's right to maintain an action for compensation for that loss against the wrongdoer is not extinguished or abridged by the association's exclusive right to seek compensation for damage to the common element.

Further, the association's primary right to sue does not diminish any claim that the unit owner may have against the association. The association's board of directors, trustees or other governing body have a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders. Acts of the governing body should be properly authorized. Fraud, self-dealing or unconscionable conduct at the very least should be subject to exposure and relief. *See, e.g., Papalexiou v. Tower West Condominium*, 167 *N.J. Super.* 516, 527 (Ch. Div. 1979); *Ryan v. Baptiste*, 565 *S.W.*2d 196, 198 (Mo. Ct. App. 1976); *Hidden Harbour Estates, Inc. v. Norman*, 309 *So.* 2d 180, 182 (Fla. D. Ct. App. 1975).

IV

Our attention must next be directed to the application of the stated principles to the facts of this case. Beginning with the election of November 10, 1977, Hartz Mountain selected only one of nine of the Association's board of directors. Further, the Developer had no directors on the board of the Recreation Association after October 19, 1978. In January 1978 the Association's board of directors designated a Legal Action Committee chaired by Sidney Siller, a plaintiff in this case, to

investigate claims against the Developer relating to (a) construction and design and (b) misrepresentation or fraud. This Committee reported to the Board of Directors in June 1978 that major deficiencies attributable to the Developer involved heat, air conditioning and insulation; noise, leaks and erosion; and inadequate parking, clubhouse, swimming and marina facilities. There were also questions concerning shrubbery and foliage. The Committee recommended engaging an attorney, who later became plaintiffs' attorney in this action, to institute the necessary litigation. The board of directors adopted this recommendation, but shortly thereafter the board rescinded the action engaging that attorney and instead utilized the Association's general counsel in its negotiations with the Developer.

A settlement was negotiated providing for the Developer to pay $400,000 to the Association and Recreation Association and for the Developer to receive a general release except for "repair and replacement" of underground utility breaks on that part of the common elements known as Sea Isle for a period of three years. Insofar as the claims and general release are confined to the common areas and facilities, we agree with the trial court and the Appellate Division that the Association had exclusive standing to maintain the action. We also agree with the trial court and the Appellate Division that plaintiffs are entitled to proceed under the fourth count of the complaint against the Association and Recreation Association because of allegedly wrongful actions taken by their respective boards of directors.

Plaintiffs as unit owners may also continue with their individual causes of action based upon damages to their individual units. Their complaint referred to such damages. The common elements as defined in the statute, *N.J.S.A.* 46:8B-3(d), and in the master deed, do not include certain items peculiar to the individual units, such as doors and windows that open from a

unit. The Associations cannot preclude plaintiffs from pursuing these claims. Each plaintiff should be prepared at the pretrial conference to itemize these individual unit owner claims. We do not pass upon the propriety of the class action, an issue which is not before us.

The judgment of the Appellate Division is affirmed in part and reversed in part. The cause is remanded for trial, costs to abide the event.

Chief Justice Wilentz and Justices Clifford, Pollock, O'Hern and Garibaldi join in this opinion.

Justice Handler did not participate.

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-292-81T2

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE J. GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife; FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single,

Plaintiffs-Appellants,

and

HARMON COVE CONDOMINIUM II ASSOCIATION, INC.,

Plaintiff-Intervenor-
Respondent,

v.

HARTZ MOUNTAIN ASSOCIATES, a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Defendants-Respondents.

Argued April 5, 1982 Decided April 28, 1982

Before Judges Allcorn, Francis and Morton I. Greenberg.

Opinion of the Superior Court of New Jersey, Appellate Division

On appeal from Superior Court, Chancery Division, Hudson County.

John Tomasin argued the cause for appellants.

Jerome A. Vogel argued the cause for defendant-respondent Hartz Mountain Industries Inc. (Jeffer, Hopkinson & Vogel, attorneys).

Richard S. Miller argued the cause for defendants-respondents Harmon Cove I Condominium Association, Inc. and Harmon Cove Recreation Association Inc. (Williams, Caliri, Miller, Otley & Horn, attorneys).

PER CURIAM

The judgment of the Chancery Division is affirmed essentially for the reasons set forth by Judge Gaulkin in his written opinion dated July 29, 1981.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Elizabeth McLaughlin
Clerk

JUDGMENT AND ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
HUDSON COUNTY
DOCKET NO. C-969-80

Civil Action

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE J. GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife; FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single,

Plaintiffs-Appellants,

and

HARMON COVE CONDOMINIUM II ASSOCIATION, INC.,

Plaintiff-Intervenor-
Respondent,

v.

HARTZ MOUNTAIN ASSOCIATES, a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Defendants-Respondents.

Judgment and Order

ORDER OF DISMISSAL
(In Part)

This matter having come on before this Court on defendants' motion to dismiss plaintiffs' complaint on motion of Jeffer, Hopkinson & Vogel, Esqs., Jerome A. Vogel, Esq. appearing, attorneys for defendant Hartz Mountain Associates (erroneously named as Hartz Mountain Industries, Inc. in the complaint but amended on the record to Hartz Mountain Associates) and Williams, Caliri, Miller, Otley & Horn, P.A., Terrence Dwyer, Esq. appearing for defendants Harmon Cove I Condominium Association, Inc. and Harmon Cove I Recreation Association, Inc. in the presence of John Tomasin, Esq., attorney for plaintiffs, and Feuerstein, Sachs & Maitlin, Esq., Allan Maitlin, Esq. appearing, attorneys for Harmon Cove Condominium II Association, Inc., and the Court having considered the pleadings, briefs and arguments of respective counsel, and good cause appearing therefore in accordance with the written decision of this Court dated July 29, 1981;

It is, on this 7th day of August, 1981,

ORDERED as follows:

1. The First, Second, Third and Fifth Counts of the complaint be and they are hereby dismissed with prejudice.

2. Plaintiffs be and they are hereby accorded an opportunity to amend and supplement the Fourth Count of the complaint, if they choose, to specify whether and in what manner and on what grounds they challenge the actions of the defendants Harmon Cove I Condominium Association, Inc. and Harmon Cove Recreation Association, Inc., and which amendment shall be filed on or before September 14, 1981 and in the absence of such a

clarifying amendment, the Fourth Count of the complaint shall be dismissed with prejudice.

s/ Geoffrey Gaulkin
HONORABLE GEOFFREY
GAULKIN, J.S.C.

Judgment and Order

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

Chambers of Geoffrey Gaulkin
Judge

Hudson County Courthouse
Administration Building
Jersey City, N.J. 07306

July 29, 1981

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Re: Sidney Siller, *et als* v. Hartz Mountain
Associates, *etc., et als*
Docket No. C-969-80

Judgment and Order

Gentlemen:

Plaintiffs Sidney Siller, *et als.*, owners of five residence units at Harmon Cove I, a condominium development in Secaucus, New Jersey, brought this action seeking a variety of relief against defendants Hartz Mountain Associates (Hartz Mountain),* Harmon Cove I Condominium Association, Inc. (Association) and Harmon Cove Recreation Association, Inc. (Recreation Association). By consent of the then parties, Harmon Cove II Condominium Association, Inc. has joined as a plaintiff-intervenor, seeking some of the same relief demanded by the plaintiffs as well as other relief. Defendants have moved to dismiss the plaintiffs' complaint on grounds that they are without capacity or standing to assert the causes of action set forth in their verified complaint.

The complaint alleges that Hartz Mountain was the planner, developer, builder and seller of both the Harmon Cove I and Harmon Cove II developments; that the Association is a non-profit corporation which "took over the common elements" in the Harmon Cove I development pursuant to the master deed and bylaws of the Association; and that the Recreation Association is a non-profit corporation "to which has been transferred and conveyed control of the recreational facilities at said Harmon Cove development . . .". Plaintiffs further allege that Hartz Mountain built the premises and the common elements in a defective and improper manner and in breach of express and implied warranties, specifying a variety of asserted construction defects both in the residential buildings and in the outlying structures and areas,

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* Hartz Mountain was erroneously named as Hartz Mountain Industries, Inc., a corporation; the appropriate amendment was noted on the record at argument but was never memorialized in an order.

including recreational areas. Based on those allegations, plaintiffs seek "specific performance to compel Hartz Mountain to specifically perform its undertakings" (First Count) as well as for damages (Second Count). Plaintiffs further seek certification of their action as a class action (Third Count).

The critical issues on the present application are focused by the Fourth Count, in which plaintiffs allege that the Association and the Recreation Association undertook to assert and to negotiate and were purporting to settle the claims of all unit owners against Hartz Mountain; that plaintiffs and other unit owners have not been adequately informed or consulted with respect to any such negotiations or settlement; and that in any event the causes of action against Hartz Mountain are not within the authority of the Association or the Recreation Association to settle. Accordingly plaintiffs seek declaratory judgment "that such settlement is beyond the powers" of the Association and Recreation Association; and they seek an injunction against the settlement without the consent of the unit owners and "a majority of property owners after full disclosure of all facts and reports as to common elements . . .".

When the complaint was filed plaintiffs' application for temporary restraints against the consummation of the contemplated settlement was denied upon representations by counsel for all defendants that any settlement would "be subject to any and all future rulings of the court upon the issues pleaded in the verified complaint." An order memorializing that understanding was entered November 24, 1980.

No question is raised here as to plaintiffs' rights, as members of the Association and Recreation Association, to seek relief against those entities for any assertedly wrongful actions taken by their managements. See *Papalexious v. Tower West*

Condominium, 167 *N.J. Super.* 516 (Ch. Div. 1979). Nor does this motion present the question whether individual unit owners can assert claims on behalf of all when their association fails to act. What is at issue, rather, is whether the Association and Recreation Association are without lawful authority to settle, on behalf of all the unit owners, the claims against Hartz Mountain.

The relations and rights of the parties are fixed by the Condominium Act, *N.J.S.A.* 46:8B-1, *et seq.* The act defines a "condominium" as

> . . . the form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in common elements appurtenant to each such unit. [*N.J.S.A.* 46:8B-3(h)]

The "unit" owned by the "unit owner" is defined as being "a part of the condominium property designed or intended for any type of independent use . . ." and includes "the proportionate undivided interest in the common elements . . ." *N.J.S.A.* 46:8B-3(o). "Common elements" is defined to include essentially all of the portions of the development which are alleged by plaintiffs here to have been improperly constructed:

> (iii) yards, gardens, walkways, parking areas and driveways, excluding any specifically reserved or limited to a particular unit or group of units;
>
> (iv) portions of the land or any improvement or appurtenance reserved exclusively for the management, operation or maintenance of the

> common elements or of the condominium property;
>
> (v) installations of all central services and utilities;
>
> (vi) all apparatus and installations existing or intended for common use;
>
> (vii) all other elements of any improvement necessary or convenient to the existence, management, operation, maintenance and safety of the condominium property or normally in common use. [*N.J.S.A.* 46:8B-3(d)]

The proportionate interest in the common elements is "inseparable from such unit" and

> . . . shall remain undivided and shall not be the object of an action for partition or division. The right of any unit owner to the use of the common elements shall be a right in common with all other unit owners (except to the extent that the master deed provides for limited common elements) to use such common elements in accordance with the reasonable purposes for which they are intended without encroaching upon the lawful rights of the other unit owners. [*N.J.S.A.* 46:8B-6].

Creation of a condominium requires the execution and recording of a master deed, *N.J.S.A.* 46:8B-8, which must include "the name and nature of the association. . .", *N.J.S.A.* 46:8B-9(k). "Association is defined as "the entity responsible for the administration of a condominium, which entity may be incorporated or unincorporated." *N.J.S.A.* 46:B-3(b).

The association thus required by statute is

> . . . responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners. [*N.J.S.A.* 46:8B-12]

Among its duties are "the maintenance, repair, replacement, cleaning and sanitation of the common elements." *N.J.S.A.* 46:8B-14. And, subject to the provisions of the master deed and its bylaws, the association "shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued." *N.J.S.A.* 46:8B-15(a).

These provisions, read together with the remaining provisions of the Condominium Act, make abundantly clear the legislative intent to provide a mechanism by which the common interests of unit owners will be protected and advanced. That mechanism is the association, which, granted responsibility to conduct "all activities of common interest to the unit owners", indisputably has authority to act in behalf of all unit owners with respect to common elements. Indeed, at oral argument, counsel for plaintiffs acknowledged that an association could properly contract on behalf of all unit owners, for example, to repave a parking area; and that, if the quality of the contractor's performance was disputed, the association could properly institute and settle litigation on behalf of all unit owners. Plaintiffs argue, however, that the statute allots to the association responsibility only for "administration", "management" and "operation" of the common elements, while the assertion of substantial claims against the original developer-owner involves "attributes of ownership and vindication of fundamental rights" which are beyond the

contemplation of the statute, the master deed or the relevant bylaws.

Neither the language nor the sense of the statute, the master deed or the Association or Recreation Association bylaws warrants the distinction thus urged. Realistic and practical application of the statutory scheme requires that the language used in and pursuant to the statute be liberally construed to include the assertion and settlement of claims on behalf of unit owners against the developer with respect to common elements. To deprive the associations of the right to act on behalf of all unit owners in such matters would leave the responsibility for and authority over the common elements fragmented and thus make vindication of the common rights highly uncertain, difficult and burdensome. The statute is clearly designed to avoid just that result.

The law cited from other jurisdictions is not persuasive of a contrary view. The cases upon which plaintiffs rely arose under early condominium statutes which were silent as to the right of the association to sue on behalf of unit owners; finding no specific authority granted to the association, courts relied on strict local pleading rules to find that claims must be prosecuted by the real parties in interest, that is, the unit owners themselves. See, *e.g.*, *Friendly Village Community Assoc., Inc. v. Silva & Hill Const. Co.*, 31 *Cal. App.* 3d 220, 107 *Cal. Rptr.* 123 (1973); *Rubenstein v. Burleigh House, Inc.*, 305 *So.* 2d 311 (Fla. Dist. Ct. App. 1974); *Deal v. 999 Lakeshore Association*, 94 *Nev.* 301, 579 *P.* 2d 775 (1978). On the other hand, where the legislative language or local pleading rules have been found to permit, the right of the association to sue in behalf of all unit owners with respect to common elements has been upheld. See, *e.g.*, *Owens v. Tiber Island Condominium Assoc.*, 373 *A* 2d 890 (D.C. 1977); *Greentree Condominium Assoc., Inc. v. RSP Corp.*, 36 *Conn. Supp.* 160, 415 *A* 2d 248 (Super. Ct. 1980); *Wittington Condominium*

Apartments, Inc. v. Braemar Corp., 313 *So.* 2d 463 (Dist. Ct. App. 1975), *cert. den.* 327 *So.* 2d 31 (Fla. 1976). See, generally, *Note*, "Condominium Class Actions", 48 *St. John's L. Rev.* 1168 (1974); *Annots.*, 72 ALR 3d 314 (1976), 69 *ALR* 3d 1148 (1976).

In New Jersey representative associations have long had standing to sue on behalf of their members even in the absence of statutory authority. See, *e.g.*, *Crescent Park Tenants Assoc. v. Realty Equities Corp. of N.Y.*, 58 *N.J.* 98 (1971). Our Condominium Act goes well beyond a mere permissive grant of standing: the statute fixes the substantive rights and duties of a condominium association. By describing rights in common elements as indivisible and held in common and giving to the association all responsibility for "administration and management" and for "the conduct of all activities of common interest" with the right to "bring suit", the statute must be said to grant to the Association and Recreation Association here the right to act on behalf of all unit owners in asserting and litigating or settling their common elements claims against Hartz Mountain. Defendants' application to dismiss the complaint is therefore granted with respect to the First, Second, Third and Fifth Counts, all of which assert causes of action against Hartz Mountain alone.

As earlier noted, however, that disposition does not determine or limit the rights of plaintiffs to challenge on either procedural or substantive grounds the actions taken or contemplated on their behalf by the Association and the Recreation Association. See *Papalexiou v. Tower West Condominium, supra.* The Fourth Count of the complaint may be read as addressing such issues, though indistinctly. Plaintiffs shall be accorded 30 days from the date hereof to amend and supplement the Fourth Count of the complaint, if they choose, to specify whether and in what manner and on what grounds they challenge the actions of the Association or Recreation Association; in the absence of such a clarifying

amendment, the Fourth Count will as well be dismissed on the grounds already stated.

Defendants may submit an appropriate form of order pursuant to *R.* 4:42-1.

Very truly yours,

s/ Geoffrey Gaulkin
GEOFFREY GAULKIN, J.S.C.

GG/rs

• • •

EXCERPTS OF VERIFIED COMPLAINT FILED NOVEMBER 13, 1980 WITH ATTACHMENT

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-HUDSON COUNTY
DOCKET NO.:

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife, FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single;

Plaintiffs,

vs.

HARTZ MOUNTAIN INDUSTRIES, INC., a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Defendants.

Plaintiffs, residing at Harmon Cove, Secaucus, New Jersey, say:

FIRST COUNT

1. Plaintiffs are individual owners of residences at Harmon Cove I, a condominium development located in Secaucus,

• • •

10. Plaintiffs bring this action on behalf of themselves and on behalf of all owners of condominium properties in Harmon

Cove Development Area I, Secaucus, New Jersey, similarly situated; (some 360 homes valued at approx. $100,000.00 each or more) and will move for an appropriate Order to determine the existence and propriety of such class action element to this lawsuit.

11. Plaintiffs, as individual property owners, have individual rights as property owners to protect their own investment and the present and future value of their individual condominium properties, including future resale value, aside and apart from their proportionate interest as holders of rights in the common elements, which are administered by the defendant associations.

12. Plaintiffs seek Judgment for specific performance to compel Hartz Mountain Industries, Inc. to specifically perform its undertakings, to plan, design, develop and build the condominium homes and the common elements of adequate materials and workmanship, in a safe and reliable manner; and seek Judgment compelling Hartz Mountain Industries, Inc. to specifically perform said obligations and to correct, replace and reconstruct all the defects and deficiencies caused by their breach of express and implied warranties, arising from the development and sale by it of said condominium premises aforesaid.

13. There is no adequate remedy at law for the relief required, as plaintiffs have taken title, moved in and live in the Harmon Cove I Development Area.

14. Such rights and claims did not merge in any closing because (a) not discoverable until after closing; (b) were continuing warranties under appropriate law; (c) were renewed by Hartz Mountain Industries at each closing; (d) continued due to Hartz Mountain influence and representation on the Boards of defendant associations after closings.

Excerpts of Verified Complaint

WHEREFORE, plaintiffs demand Judgment for specific performance, requiring Hartz Mountain Industries, Inc. to correct, replace and reconstruct all of the said defects and deficiencies resulting from the breach of express warranties and implied warranties aforesaid.

SECOND COUNT

1. Plaintiffs repeat the allegations contained in the First Count.

2. Hartz Mountain Industries, Inc. planned, designed, developed, built and sold said condominium properties and the said common elements in such a negligent and defective manner, with negligent and inadequate studies and testing; with inadequate plans, specifications and safeguards for the conditions at the site; and with inadequate supervision, testing and inspection; and of such defective materials and workmanship, as to allow the condominium units in Harmon Cove I and the common elements to be built in an unsafe and defective manner, which defects were not apparent when the individual premises, as well as the common element premises, were transferred by the seller, as aforesaid.

3. As the direct and proximate result of the carelessness and negligence of the defendant Hartz Mountain Industries, Inc., the individual condominium premises were improperly designed, planned, developed and built; as were the common elements; and after passage of some time, said serious defects and deficiencies became known, to the damage of plaintiffs, as well as all property owners in the class, who own property in said development; and who have a proportional interest in the common elements, as aforesaid.

4. Hartz Mountain Industries, Inc. knew, or ought to have known, that the tests and studies were inadequate and that the

individual units, as well as the common elements, were defective, as designed, planned, developed and built; and as a direct and proximate result of the carelessness and negligence of Hartz Mountain Industries, Inc., the plaintiffs, as well as all owners in the same class similarly situated, and all owners of proportional interests in the common elements, have suffered damage, and will in the future suffer additional damage, as follows:

(a) Substantial monies have been spent in past years to try to correct the defects caused by the negligence and carelessness of defendants, which sums should be reimbursed to plaintiffs and to the two defendant associations, with interest, counsel fees and costs;

(b) Future costs necessitated by present and future efforts to stabilize and correct the defects and deficiencies above stated, should be determined and reimbursed by defendant Hartz Mountain Industries, Inc. to plaintiffs and to the two defendant associations;

(c) The present and future loss and damages caused by present limitations, and future decrease, in value of the common elements, as the defects continue and the common elements deteriorate, due to the negligence, carelessness, defects and deficiencies, and breaches of warranty caused by defendant Hartz Mountain Industries, Inc.

(d) The present and future loss and damages caused by present limitation and future decrease in value of the individual homes of individual property owners, as such defect continue and the individual units deteriorate, due to the negligence, carelessness, defects, deficiencies and breaches of warranty caused by defendant Hartz Mountain Industries, Inc.

Excerpts of Verified Complaint

WHEREFORE, plaintiffs demand Judgment for damages, interest, counsel fees and costs.

THIRD COUNT

1. Plaintiffs repeat the allegations contained in the First and Second Counts.

2. The property owners in Harmon Cove Area I, other than plaintiffs, are similarly situated and common questions of law and fact apply to their individual condominium units, which also have similar defects and deficiencies caused by the breach of express and implied warranties, as well as the carelessness and negligence of Hartz Mountain Industries, Inc.; including their proportionate share of the common elements, which are administered by the defendant associations, and adequate notice, reports and participation in this litigation, are required if a class action should be approved; and plaintiffs seek Orders establishing such class and making adequate provisions for notice, reports and for representation for the benefit of all members of said class, as aforesaid.

WHEREFORE, plaintiffs demand Judgment for similar relief to be granted in this case to all members in the class; namely all owners of condominium properties, and proportional owners of the common elements, in Harmon Cove Area I, Secaucus, N.J.

• • •

FIFTH COUNT

1. Plaintiffs repeat the allegations contained in the First, Second, Third and Fourth Counts.

Excerpts of Verified Complaint

2. As the result of the breach of the express and implied warranties by of Hartz Mountain Industries, Inc. and their carelessness and negligent design, planning, development and construction of the said condominium units and common elements, as aforesaid, numerous expenditures and repairs have been made by the defendant associations, which are properly attributable to and the responsibility of, the defendant Hartz Mountain Industries, Inc.

3. No adequate record or accounting of such expenses (as opposed to proper ordinary and regular association upkeep and maintenance expenses) have ever been compiled or allocated, and made available to the individual property owners, as well as to the members of the defendant associations. Such accounting is necessary in order that Hartz Mountain Industries, Inc. may reimburse plaintiffs and home owners similarly situated, as well as the defendant associations, for such costs and charges, and accordingly, an accounting thereof is absolutely essential by Hartz Mountain Industries, Inc. and by defendant associations.

4. In addition, individual property owners have been put to various expenses to try to correct and ameliorate the effects of such defects and deficiencies in their own units, which expenses must also be reimbursed to the individual property owners by the defendant Hartz Mountain Industries, Inc.

5. Such calculations will be numerous, detailed and complex, and an accounting will be necessary in order to adequately determine the nature and extent of all such allocations and payments, and to determine the amounts that Hartz Mountain Industries, Inc. should reimburse plaintiffs and others similarly situated, as well as the two defendant associations, for all expenses and outlays in all past years, caused by the breachs of warranty and the negligence and carelessness of defendant Hartz Mountain

Industries, Inc., and by its negligent design, planning, development and building of said Harmon Cove I Condominiums and common elements (a) to do equity, and (b) to prevent unjust enrichment of defendant Hartz Mountain Industries, Inc.

WHEREFORE, plaintiffs demand Judgment for accounting and reimbursement by defendant Hartz Mountain Industries, Inc.,

(a) to plaintiffs and all others similarly situated for reimbursement of such expenses and outlays as to individual condominium units;

(b) to defendant associations for reimbursement of such expenses and outlays as to the common elements;

(c) generally, on all counts, such other relief as may be just and equitable.

JOHN TOMASIN, ESQ. P.A.

s/ John Tomasin
JOHN TOMASIN,
ATTORNEY FOR PLAINTIFFS

EXHIBIT "A"

WILLIAMS, CALIRI, MILLER, OTLEY & HORN
A Professional Corporation
1428 Route 23, Wayne, New Jersey 07470
[Area Code 201] 694-0600

Excerpts of Verified Comp!aint

October 23, 1980

Mr. Eugene Heller
Hartz Mountain Industries, Inc.
One Harmon Plaza
P.O. Box 1411
Secaucus, NJ 07094

Re: Harmon Cove I Condominium Association and Harmon Cove Recreation Association - Dispute with Hartz

Dear Mr. Heller:

This will confirm the settlement proposal put forth by your organization at our meeting today. Subject to Board approvals the above dispute will be settled upon the following terms:

1. Hartz will pay Harmon Cove I and Harmon Cove Recreation Association the sum of $150,000.00 now.

2. Hartz will pay Harmon Cove I and Harmon Cove Recreation an additional $250,000.00 in six equal annual installments. There will be no interest payable on the outstanding balances. The payments will commence one year after the settlement.

3. Hartz will be entitled to a General Release from Harmon Cove Recreation Association which release will specifically include but not be limited to problems which may be experienced with the Marina Bulkhead.

4. Hartz will be entitled to a General Release from Harmon Cove I with the following described exception.

Excerpts of Verified Complaint

5. Hartz acknowledges its responsibility for the cost of repairing underground utility breaks on Sea Isle for a period of three years.

As I advised you, I will recommend the settlement to the two Boards. It is my belief that they should and will find this acceptable. I further acknowledge that this is Hartz's final offer and that any further negotiations will prove fruitless.

We hope to convene special meeting of the Boards during the next week or ten days to secure the requisite approvals.

Sincerely,

s/ Terry Dwyer
Terrence Dwyer

TD:dk

EXCERPTS FROM ORIGINAL BRIEF IN SUPERIOR COURT, CHANCERY DIVISION, ON DEFENDANTS' MOTION TO DISMISS COMPLAINT ARGUED DECEMBER 19, 1980

Page 4 (Paragraph 9):

> This is of crucial importance because the Condominium Act expressly guarantees to unit owners full and complete rights, *as owners* of real property — equal to *all other owners* of real estate. (Emphasis in original.)

Page 5 (Paragraph 10):

> . . .(Role of Association is to administer and maintain facilities). . .not to settle the claims all owners have, for breach of warranty in the contract, performance and sale of the condominiums, to the *owners*. (Emphasis in original.)

Page 5 (Paragraph 11):

> 11. The Unit Owners, by permitting the associations to *administer and manage* the common elements, thus never gave up their property rights as *owners*, including their individual claims and collective class actions as purchase-owners, for breach of warranty, for the original defective design, planning, building and development of the condominium property, and as further stated in the complaint. (Emphasis in original.)

Excerpts from Original Brief

Page 5 (Paragraph 12):

> 12. Nothing in the brief of either defendant contains any authoritative provision to the contrary, and the inherently limited and ***subordinate*** role of the associations can in no way deprive the Unit Owners of their own individual and collective property rights, including their right to vindicate all ownership rights for breach of warranty for defective plumbing, design, building and development of the condominium property.

EXCERPTS FROM HEARING TRANSCRIPT OF MOTION TO DISMISS COMPLAINT HEARD BY NEW JERSEY SUPERIOR COURT, CHANCERY DIVISION DATED DECEMBER 19, 1980

[Commencing at page 16]

* * *

To me what we now have to do is look at the statutory scheme. Was that the intent of the Legislature.

THE COURT: That's a problem, and I think one of the briefs calls that the tail wagging the dog.

MR. TOMASIN: May I respond to that briefly, your Honor.

THE COURT: Yes.

MR. TOMASIN: Counsel would love to have this whole case in point degenerate into a question of dissidents, because that begs the question that the plaintiffs are members of the Association, and that that completely defines their rights and status.

We're not in a business. We're owners of property who have property rights independent of the Association, whose role it was for the owners to run the condominium, if it had been properly built in the first place. It is a very clever way of limiting the question here by talking of dissidents and dissatisfied people.

We're not dissidents. We're just owners of property under the statute like every other owner, who [17] has rights pertaining to ownership, . .

Excerpts from Hearing Transcript

• • •

This case, I think, your Honor, must hinge on the nature of the condominium law. No provision, no argument, can go beyond the intent and purpose of the statute itself, and the statute itself made it clear that the unit owners own property like any other owner of real estate, and that the common elements are [18] inextricably connected with that ownership, that any convenience or device, whether it be by means of an association or otherwise, to administer those are still subject and subordinate to the ownership rights of each individual owner, and even when legal title to one small portion in the recreational field, and nakedly the title is in the association, the equitable title is with the owners of the real estate whose property is enhanced and whose value is determined by the common elements.

This argument that Counsel makes, that the Associations have some superior, exclusive or overriding right, has been decided in the states where you expect condominium law to be made — California, Florida, Connecticut. We cited the cases. In each and every case, the exact question was decided, and the condominium associations had no such standing. They were not the real parties in interest. The class actions inured in the owners and only the owners.

• • •

[19] In the New Jersey law, the only phrase that they can point to is a phrase that a condominium association can sue and be sued. Of course it can. If it hires somebody to plow the parking lot or to fix the building within their sphere, naturally they have to be able to vindicate that right.

• • •

Excerpts from Hearing Transcript

MR. TOMASIN: Yes, and any argument can be carried out to an extreme where the extreme makes the rule look peculiar; but, as a matter of fact, the question here is as to a claim against the developer by an owner. When he says I want to sue the developer, the [20] question is does he have that right or doesn't he. Did he give it away somehow or other, and in that case—

• • •

THE COURT: So that even though by your theory the Association would not have standing itself—

MR. TOMASIN: Precisely.

• • •

[Commencing at page 29]

MR. TOMASIN: Just three sentences, if I may.

Mr. Vogel, number one, misunderstands my argument with respect to lawsuits that the condominium association is involved in where it buys materials and fixes a building and it collapses. The owners have no right to interfere in that type of matter.

All of the matters that the Association has with respect to managing, maintaining, repairing and handling the common elements, under the statute, they have the right to sue and be sued. Those decisions and those lawsuits are their exclusive province. I have never said otherwise.

What I am saying here is the dog is the owners. The tail is the Association that was delegated for one limited function; namely, handling the common elements, and it is the owners'

rights to vindicate their contract property rights that they are asserting here in which the Association claims that they have a right to block.

• • •

[30] MR. TOMASIN: It's a completely different story from what we are contending in this case. In this case the rights antedate the Associations. These rights go back when the place was first built, before they had conveyed — at the time they were conveyed, and during the time when Hartz controlled both the Associations, and it's a completely different cause of action that's involved here. Property rights of owners are involved here.

THE COURT: What's your position as to the Recreation Association?

MR. TOMASIN: My position is the Recreation Association — is that although naked legal title to the recreational facilities is in the recreation nonprofit corporation, that it has no beneficial ownership. It is merely a trustee and fiduciary. The equity is in the owners under the condominium laws, and that all of the [31] rights and all of the attributes of ownership inure in the owners.

• • •

MR. TOMASIN: It's as if a developer, Hartz here, instead of selling [32] condominium units, sold a hundred houses with the land and a little fence and so forth, a conventional house, to a hundred different owners, and then also conveyed a swimming pool to an association to run and manage.

The fact that the swimming pool is run jointly or a contract was made for that association to mow the lawns doesn't take away

the owners' rights. The owners' rights as real estate owners are not affected.

* * *

EXCERPTS FROM BRIEF BEFORE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

• • •

It is thus clear by relevant statutory language that the ultimate ownership of *all* the condominium property and all the common elements, remains in the individual owners, who have the right to sell same; and the right to protect their investment and value like any other owner of real property; and only they can settle or litigate claims which have damaged and diminished same in the past; are continuing; and will damage and diminish same in the future. Breach of contract between owner and developer was never entrusted to the association, which merely operates, maintains and manages the common elements only.

13. The Legislature in creating such flexible and valuable method of holding, developing, conveying, and owning condominium property, thus conditioned same, and provided that the individual condominium owners are true *owners* in fee simple of all the units and all the common elements, with rights equal with all other types of real estate owners.

14. Under *RS 46:8B-7*, any private agreement, whether by deed, by-laws, "rules", etc. (or court decision?).

> "—contrary to the provisions of this act shall be *void*."

• • •

17. RS 46:8B-14 delineates the "Duties of the association", which involve basically: —

(a) "The *maintenance*, *repair*, *replacement*, *cleaning* and *sanitation* of the common elements."

Excerpts from Brief Before Superior Court of New Jersey, Appellate Division

(b) assessment of common expenses to owners (which confirms owners as the real parties in interest, a vital concept).

(c) adoption of rules governing use of the common elements, subject to the right of the owners to change same.

* * *

All are obviously related and *limited to,* the continuing duty to *administer* and *manage* the condominium property and common elements, not to *own* same, or *exercise* the *prerogatives* of *ownership,* which have *not* been confided or conveyed to the associations.

* * *

POINT II

* * *

2. As to the purchase and sale agreements with Developer, the unit owners acquired title to individual condominiums and the appurtenant proportionate parts by percentage of the common elements, as real estate owners. As such owners, under the Condominium Act, they acquired the right to deal with such "---real property---" fully, "---in the same manner as is otherwise permitted by law for any other parcel of real property". RS 46:8B-4.

3. Accordingly, they have the right to protect their investment and its market value; as well as to litigate for damages, and for declaratory judgment, accounting; breach of warranty;

breach of contract; negligence and all the other relief sought in the complaint.

* * *

. . . Since the Unit Owners will ultimately pay the costs and assessments, and face liens if they do not, they are the real parties in interest even as to costs of *repairs*; not to mention their additional rights to prevent deterioration of the Common Elements, due to breach of warranty and negligence, which must affect the market ability of their property; the value of their investment; and the past, present and future enjoyment of their property, and the resale value of their property.

* * *

9. It is submitted that nowhere in the country does general language giving associations the right to contract and to sue *within* their sphere, serve to detract or deprive the unit owners of their property rights as owners in fee simple of *their* rights to preserve protect and defend their property interests, particularly antecedent breach of contract and warranty claims as between Developer-Seller and Owner-Buyer.

* * *

11. Any other rule would deprive condominium property owners of property rights without due process of law.

* * *

EXCERPTS FROM PETITION FOR CERTIFICATION TO THE NEW JERSEY SUPREME COURT

• • •

STATEMENT OF QUESTIONS INVOLVED

Under the New Jersey Condominium Act, RS 46:8B-1, et seq:

1. Do individual buyer-owners of individual condominium townhouse residences in fee simple absolute, under RS 46:8B-6(q), have standing to sue the seller-developer thereof for breach of contract, breach of warranty, negligent and defective planning and design; and negligent and defective construction thereof, and diminished market value thereof?

• • •

4. Is a construction of RS 46:8B-12, that non-profit associations, formed the "administration and management" of the condominium property, have exclusive jurisdiction and standing on all lawsuits and claims whatsoever, against the developer (including claims of breach of contract, breach of warranty, etc., that antedate construction, sale and closing of title), to the exclusion of buyer-owners, sound?

• • •

6. Would such a construction discriminate against them as owners of real property in fee simple, and deprive them of property rights without legal protection and without due process of law, in the light of RS 46:8B-4, which provides that owners of condominium real estate are accorded full rights as "—permitted by law for any other parcel of real property".

• • •

Excerpts from Petition for Certification to the New Jersey Supreme Court

7. It is submitted that there is no basis in law for depriving contract owners in fee simple of their right, as real parties in interest, to sue developer for breach of contract; breach of warranty, etc. The role of the associations is to "administer and manage" the common elements, *not* usurp the independent property right of owners.

• • •

ARGUMENT

POINT THREE

1. If the Condominium Act were construed to relegate buyer-*owners* of condominium real estate property to the mere status of quasi-stockholders or members of non-profit corporations, whose rights are totally determined by volunteer Boards of Directors of non-profit corporations, formed to "manage and administer" the common elements after contract of sale and closing, (as if the non-profit corporations were the beneficial-owners) subject only to a suit against such directors for fraud or abuse of discretion or the like, such construction would unlawfully discriminate against such condominium owners as a class of real estate owners — as opposed to *other* owners of real property. It would deprive condominium owners of valuable property rights, without due process of law.

2. Such construction would cause grievous uncertainty and ultimately chaos in the marketability and value of such condominium real estate, purchased in reliance on RS 46:8B-6(q) which expressly provides that condominium owners are owners of real estate "—fee simple—" and RS 46:8B-4 that such condominium owners may deal with their property

Excerpts from Petition for Certification to the New Jersey Supreme Court

> "—in the same manner as is otherwise permitted by law for *any other parcel of real property*—"

3. Condominium real property is a vested right in real estate, which requires stability to maintain marketability.

• • •

8. The ownership in fee simple of the condominium real estate being clear, and the common elements being "—appurtenant to each such unit—", RS 46:8B-3(h), and "—belonging thereto or intended for the benefit thereof—" to be administered without "—encroachment upon the lawful rights of the other unit owners" (RS 46:8B-6), the vested rights of such owners cannot be diminished, taken away or prejudiced without due process of law.

No cause is shown to discriminate against condominium real estate buyers in their right to sue for breach of contract, breach of warranty; defective design, planning and construction of the condominium town houses, equal to the buyer-owners of *any other real estate.*

9. The Constitutions of the United States and of New Jersey prohibit such lack of due process; discrimination among those similarly situated; and lack of equal protection of the laws.

10. Constitutional equal protection applies to acts of the Legislature, and also "—decisions of its Courts", *Jersey Shore v. Estate of Baum*, 84 N.J. 137 at p. 145 (1980).

11. No rational basis or classification to bar plaintiffs as buyer-owners of real estate from sueing seller-developer appears.

Excerpts from Petition for Certification to the New Jersey Supreme Court

Their real estate contracts antedate the involvment of the management associations, and are the same as any other real estate contract. Such bar must fall, as an unlawful deprival of vested property rights, without due process or equal protection of law.

12. A radical construction of the Condominium Act by indirection, whereby the general non-mandatory *grant* of power to "sue and be sued" to non-profit corporations, becomes an *exclusive* right; and the owners are *deprived* of their rights, has no basis in law, justice or equity.

13. To exalt the general non-mandatory "right to sue" in *some* cases, to deprive owners of *their* right to sue in other cases, is to raise simplistic literalness to a commandment, for which there is no authority in law. The surest way to misconstrue a statute is to read it too literally. *Schiershead v. Birgantine*, 29 N.J. 220.

* * *

RELEVANT STATUTES

RS 46:8B-1. Short title — Revised Statutes of New Jersey

This act shall be known and may be cited as the "Condominium Act." L.1969, c. 257, §1, eff. Jan. 7, 1970.

46:8B-3. Definitions

The following words and phrases as used in this act shall have the meanings set forth in this section unless the context clearly indicates otherwise:

a. "Assigns" means any person to whom rights of a unit owner have been validly transferred by lease, mortgage or otherwise.

b. "Association" means the entity responsible for the administration of a condominium, which entity may be incorporated or unincorporated.

c. "Bylaws" means the governing regulations adopted under this act for the administration and management of the property.

d. "Common elements" means:

(i) the land described in the master deed;

(ii) as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units;

(iii) yards, gardens, walkways, parking areas and driveways, excluding any specifically reserved or limited to a particular unit or group of units;

(iv) portions of the land or any improvement or appurtenance reserved exclusively for the management, operation or maintenance of the common elements or of the condominium property;

(v) installations of all central services and utilities;

(vi) all apparatus and installations existing or intended for common use;

(vii) all other elements of any improvement necessary or convenient to the existence, management, operation, maintenance and safety of the condominium property or normally in common use; and

(viii) such other elements and facilities as are designated in the master deed as common elements.

e. "Common expenses" means expenses for which the unit owners are proportionately liable, including but not limited to:

(i) all expenses of administration, maintenance, repair and replacement of the common elements;

(ii) expenses agreed upon as common by all unit owners; and

(iii) expenses declared common by provisions of this act or by the master deed or by the bylaws.

Relevant Statutes

f. "Common receipts" means:

(i) rent and other charges derived from leasing or licensing the use of common elements;

(ii) funds collected from unit owners as common expenses or otherwise; and

(iii) receipts designated as common by the provisions of this act or by the master deed or the bylaws.

g. "Common surplus" means the excess of all common receipts over all common expenses.

h. "Condominium" means the form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in common elements appurtenant to each such unit.

i. "Condominium property" means the land covered by the master deed, whether or not contiguous and all improvements thereon, all owned either in fee simple or under lease, and all easements, rights and appurtenances belonging thereto or intended for the benefit thereof.

j. *"Developer" means the person or persons who create a condominium or lease, sell or offer to lease or sell a condominium or units of a condominium in the ordinary course of business, but does not include an owner or lessee of a unit who has acquired his unit for his own occupancy.*

k. "Limited common elements" means those common elements which are for the use of one or more specified units to the exclusion of other units.

l. "Majority" or "majority of the unit owners" means the owners of more than 50% of the aggregate in interest of the undivided ownership of the common elements as specified in the master deed. If a different percentage of unit owners is required to be determined under this act or under the master deed or bylaws for any purpose, such different percentage of owners shall mean the owners of an equal percentage of the aggregate in interest of the undivided ownership of the common elements as so specified.

m. "Master deed" means the master deed recorded under the terms of section 8 of this act,[1] as such master deed may be amended or supplemented from time to time, being the instrument by which the owner in fee simple or lessee of the property submits it to the provisions of this chapter.

n. "Person" means an individual, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof.

o. "Unit" means a part of the condominium property designed or intended for any type of independent use, having a direct exit to a public street or way or to a common element or common elements leading to a public street or way or to an easement or right of way leading to a public street or way, and includes the proportionate undivided interest in the common

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1. Section 46:8B-8.

elements and in any limited common elements assigned thereto in the master deed or any amendment thereof.

p. "Unit deed" means a deed of conveyance of a unit in recordable form.

q. "Unit owner" means the person or persons owning a unit in fee simple.

L.1969, c. 257, §3, eff. Jan. 7, 1970. Amended by L.1973, c. 216, §1, eff. Aug. 23, 1973; L.1979, c. 157, §1, eff. July 19, 1979.

46:8B-4. Status of units

Each unit shall constitute a separate parcel of real property which may be dealt with by the owner thereof in the same manner as is otherwise permitted by law for any other parcel of real property.

L.1969, c. 257, §4, eff. Jan. 7, 1970.

46:8B-5. Types of ownership

Any unit may be held and owned by one or more persons in any form of ownership, real estate tenancy or relationship recognized under the laws of this State.

L.1969, c. 257, §5, eff. Jan. 7, 1970.

46:8B-6. Common elements

The proportionate undivided interest in the common elements assigned to each unit shall be inseparable from such unit, and

any conveyance, lease, devise or other disposition or mortgage or other encumbrance of any unit shall extend to and include such proportionate undivided interest in the common elements, whether or not expressly referred to in the instrument effecting the same. The common elements shall remain undivided and shall not be the object of an action for partition or division. The right of any unit owner to the use of the common elements shall be a right in common with all other unit owners (except to the extent that the master deed provides for limited common elements) to use such common elements in accordance with the reasonable purposes for which they are intended without encroaching upon the lawful rights of the other unit owners.

L.1969, c. 257, §6, eff. Jan. 7, 1970.

46:8B-7. Invalidity of contrary agreements

Any agreement contrary to the provisions of this act shall be void.

L.1969, c. 257, §7, eff. Jan. 7, 1970.

ARTICLE II. BLANK

ARTICLE III. CREATION OF A CONDOMINIUM

46:8B-8. Method of creation

A condominium may be created and established by recording in the office of the county recording officer of the county wherein the land is located a master deed executed and acknowledged by all owners, *or the lessees* setting forth the matters required by section

9 of this act.[1] This act shall apply solely to real property of interests therein which have been subjected to the terms of this act as provided in this section.

L.1969, c. 257, §8, eff. Jan. 7, 1970. Amended by L.1973, c. 216, §2, eff. Aug. 23, 1973.

46:8B-8.1. Establishment of condominium upon land held under lease

Nothing in the act to which this act is a supplement shall be construed to prevent the creation and establishment of a condominium as defined in this act, upon land held under a lease by the lessee or creator of the condominium, provided that the master deed required under this act shall be signed, not only by the lessee, but also by the lessor of the land who holds the legal title to the land in fee simple.

L.1973, c. 216, §3, eff. Aug. 23, 1973.

46:8B-9. Contents of master deed

The master deed shall set forth, or contain exhibits setting forth the following matters:

(a) A statement submitting the land described in such master deed to the provisions of this act.

(b) A name, including the word "condominium" or followed by the words "a condominium," by which the property shall thereafter be identified.

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1. Section 46:8B-9.

(c) A legal description of the land.

(d) A survey of the land and plans or other graphic description of the improvements erected or to be erected thereon in sufficient detail to show and identify common elements, each unit and their respective locations and approximate dimensions. Such plans or other graphic description shall bear a certification by an engineer or architect authorized to practice his profession in this State setting forth that such plans constitute a correct representation of the improvements described.

(e) An identification of each unit by distinctive letter, name or number so that each unit may be separately described thereafter by such identification.

(f) A description of the common elements and limited common elements, if any.

(g) The proportionate undivided interests in the common elements and limited common elements, if any, appurtenant to each such unit. Such interests shall in each case be stated as percentages aggregating 100%.

(h) The voting rights of unit owners.

(i) By-laws.

(j) A method of amending and supplementing the master deed, which shall require the recording of any such amendment or supplement in the same office as the master deed before it shall become effective.

(k) The name and nature of the association and if such association is not incorporated, the name and residence address,

within this State of the person designated as agent to receive service of process upon such association.

(l) The proportions or percentages and manner of sharing common expenses and owning common surplus.

(m) Such other provisions, not inconsistent with this act, as may be desired, including but not limited to restrictions or limitations upon the use, occupancy, transfer, leasing or other disposition of any unit (provided that any such restriction or limitation shall be otherwise permitted by law) and limitations upon the use of common elements.

L.1969, c. 257, §9, eff. Jan. 7, 1970.

46:8B-10. Unit deeds and other instruments

A deed, mortgage, lease or other instrument pertaining to a unit shall have the same force and effect in regard to such unit as would be given to a like instrument pertaining to other real property which has been similarly made, executed, acknowledged and recorded. A unit deed shall contain the following:

(a) The name of the condominium as set forth in the master deed, the name of the political subdivision and county in which the condominium property is located and a reference to the recording office, the book and page where the master deed and any amendment thereto are recorded.

(b) The unit designation as set forth in the master deed.

(c) A reference to the last prior unit deed conveying such unit, if previously conveyed.

(d) A statement of the proportionate undivided interest in the common elements appurtenant to such unit as set forth in the master deed or any amendments thereof.

(e) Any other matters, consistent with this act, which the parties may deem appropriate.

L.1969, c. 257, §10. eff. Jan. 10, 1970.

46:8B-11. Amendments to master deed

The master deed may be amended or supplemented in the manner set forth therein. Unless otherwise provided therein, no amendment shall change a unit unless the owner of record thereof and the holders of record of any liens thereon shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed. Notwithstanding any other provision of this act or the master deed, the designation of the agent for service of process named in the master deed may be changed by an instrument executed by the association and recorded in the same office as the master deed.

L.1969, c. 257, §11, eff. Jan. 7, 1970.

ARTICLE IV. ADMINISTRATION

46:8B-12. The association

The association provided for by the master deed shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners. The association may be any entity recognized by

the laws of New Jersey, including but not limited to a business corporation or a nonprofit corporation.

L.1969, c. 257, §12, eff. Jan. 7, 1970.

46:8B-12.1. Members of governing board; elections; written approval of actions by developer; control by board; delivery of items

a. When unit owners other than the developer own 25% or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect not less than 25% of the members of the governing board or other form of administration of the association. Unit owners other than the developer shall be entitled to elect not less than 40% of the members of the governing board or other form of administration upon the conveyance of 50% of the units in a condominium. Unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration upon the conveyance of 75% of the units in a condominium. However, when some of the units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration.

Notwithstanding any of the provisions of subsection a of this section, the developer shall be entitled to elect at least one member of the governing board or other form of administration of an association as long as the developer holds for sale in the ordinary course of business one or more units in a condominium operated by the association.

b. Within 30 days after the unit owners other than the developer are entitled to elect a member or members of the governing board or other form of administration of an association, the association shall call, and give not less than 20 days' nor more than 30 days' notice of, a meeting of the unit owners to elect the members of the governing board or other form of administration. The meeting may be called and the notice given by any unit owner if the association fails to do so.

c. If a developer holds one or more units for sale in the ordinary course of business, none of the following actions may be taken without approval in writing by the developer:

(1) Assessment of the developer as a unit owner for capital improvements.

(2) Any action by the association that would be detrimental to the sales of units by the developer. However, an increase in assessments for common expenses without discrimination against the developer shall not be deemed to be detrimental to the sales of units.

d. Prior to, or not more than 60 days after, the time that unit owners other than the developer elect a majority of the members of the governing board or other form of administration of an association, the developer shall relinquish control of the association, and the unit owners shall accept control. Simultaneously, the developer shall deliver to the association all property of the unit owners and of the association held or controlled by the developer, including, but not limited to, the following items, if applicable, as to each condominium operated by the association:

Relevant Statutes

(1) A photocopy of the master deed and all amendments thereto, certified by affidavit of the developer, or an officer or agent of the developer, as being a complete copy of the actual master deed.

(2) A certified copy of the association's articles of incorporation, or if not incorporated, then copies of the documents creating the association.

(3) A copy of the bylaws.

(4) The minute books, including all minutes, and other books and records of the association, if any.

(5) Any house rules and regulations which have been promulgated.

(6) Resignations of officers and members of the governing board or other form of administration who are required to resign because the developer is required to relinquish control of the association.

(7) An accounting for all association funds, including capital accounts and contributions.

(8) Association funds or control thereof.

(9) All tangible personal property that is property of the association, represented by the developer to be part of the common elements or ostensibly part of the common elements, and an inventory of that property.

(10) A copy of the plans and specifications utilized in the construction or remodeling of improvements and the supplying

of equipment to the condominium and in the construction and installation of all mechanical components serving the improvements and the site, with a certificate in affidavit form of the developer, his agent, or an architect or engineer authorized to practice in this State that such plans and specifications represent, to the best of their knowledge and belief, the actual plans and specifications utilized in the construction and improvement of the condominium property and for the construction and installation of the mechanical components serving the improvements. If the condominium property has been declared a condominium more than 3 years after the completion of construction or remodeling of the improvements, the requirements of this paragraph shall not apply.

(11) Insurance policies.

(12) Copies of any certificates of occupancy which may have been issued for the condominium property.

(13) Any other permits issued by governmental bodies applicable to the condominium property in force or issued within 1 year prior to the date the unit owners other than the developer take control of the association.

(14) All written warranties of the contractor, subcontractors, suppliers, and manufacturers, if any, that are still effective.

(15) A roster of unit owners and their addresses and telephone numbers, if known, as shown on the developer's records.

(16) Leases of the common elements and other leases to which the association is a party.

(17) Employment contracts, management contracts, maintenance contracts, contracts for the supply of equipment or materials, and service contracts in which the association is one of the contracting parties and maintenance contracts and service contracts in which the association or the unit owners have an obligation or responsibility, directly or indirectly to pay some or all of the fee or charge of the person or persons performing the service.

(18) All other contracts to which the association is a party.

L.1979, c. 157, §2, eff. July 19, 1979.

Title of Act:

An Act to amend and supplement the "condominium Act," approved January 7, 1970 (P.L.1969, c. 257). L.1979, c. 157.

Statement: Committee statement to Senate, No. 182—L.1979, c. 157, see §46:8B-3.

46:8B-12.2. Management, employment, service or maintenance contract or contract for equipment or materials; 2 year limitation

Any management, employment, service or maintenance contract or contract for the supply of equipment or material, which is directly or indirectly made by or on behalf of the association, prior to the unit owners having elected at least 75% of the members of the governing board or other form of administration of the association, shall not be entered into for a period in excess of 2 years. Any such contract or lease may not be renewed or extended for periods in excess of 2 years and at the end of any 2-year period, the association may terminate any further renewals or extensions thereof.

L.1979, c. 157, §3, eff. July 19, 1979.

Statement: Committee statement to Senate, No. 182—L.1979, c. 157, see §46:8B-3.

46:8B-13. By-laws

The administration and management of the condominium and condominium property and the actions of the association shall be governed by by-laws which shall initially be recorded with the master deed and shall provide, in addition to any other lawful provisions, for the following:

(a) The form of administration, indicating the titles of the officers and governing board of the association, if any, and specifying the powers, duties and manner of selection, removal and compensation, if any, of officers and board members.

(b) The method of calling meetings of unit owners, the percentage of unit owners or voting rights required to make decisions and to constitute a quorum, but such by-laws may nevertheless provide that unit owners may waive notice of meetings or may act by written agreement without meetings.

(c) The manner of collecting from unit owners their respective shares of common expenses and the method of distribution to the unit owners of their respective shares of common surplus or such other application of common surplus as may be duly authorized by the by-laws.

(d) The method by which the by-laws may be amended, provided that no amendment shall be effective until recorded in the same office as the then existing by-laws. The by-laws may also provide a method for the adoption, amendment and

enforcement of reasonable administrative rules and regulations relating to the operation, use, maintenance and enjoyment of the units and of the common elements including limited common elements.

L.1969, c. 257, §13, eff. Jan. 7, 1970.

46:8B-14. Duties of the association

The association, acting through its officers or governing board, shall be responsible for the performance of the following duties, the costs of which shall be common expenses:

(a) The maintenance, repair, replacement, cleaning and sanitation of the common elements.

(b) The assessment and collection of funds for common expenses and the payment thereof.

(c) The adoption, distribution, amendment and enforcement of rules governing the use and operation of the condominium and the condominium property and the use of the common elements subject to the right of a majority of unit owners to change any such rules.

(d) the maintenance of insurance against loss by fire and other casualties normally covered under broad-form fire and extended coverage insurance policies as written in this State, covering all common elements and all structural portions of the condominium property and the application of the proceeds of any such insurance to restoration of such common elements and structural portions if such restoration shall otherwise be required under the provisions of this act or the master deed or by-laws.

(e) The maintenance of insurance against liability for personal injury and death for accidents occurring within the common elements whether limited or general and the defense of any actions brought by reason of injury or death to person, or damage to property occurring within such common elements and not arising by reason of any act or negligence of any individual unit owner.

(f) the master deed or by-laws may require the association to protect blanket mortgages, or unit owners and their mortgages, as their respective interest may appear, under the policies of insurance provided under clauses (d) and (e) of this section, or against such risks with respect to any or all units, and may permit the assessment and collection from a unit owner of specific charges for insurance coverage applicable to his unit.

(g) The maintenance of accounting records, in accordance with generally accepted accounting principles, open to inspection at reasonable times by unit owners. Such records shall include:

(i) A record of all receipts and expenditures.

(ii) An account for each unit setting forth any shares of common expenses or other charges due, the due dates thereof, the present balance due, and any interest in common surplus.

(h) Nothing herein shall preclude any unit owner or other person having an insurable interest from obtaining insurance at his own expense and for his own benefit against any risk whether or not covered by insurance maintained by the association.

(i) Such other duties as may be set forth in the master deed or by-laws.

L.1969, c. 257, §14, eff. Jan. 7, 1970.

Relevant Statutes

46:8B-15. Powers of the association

Subject to the provisions of the master deed, the by-laws and the provisions of this act, the association shall have the following powers:

(a) Whether or not incorporated, the association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued. If the association is not incorporated, it may be deemed to be an entity existing pursuant to this act and a majority of the members of the governing board or of the association, as the case may be, shall constitute a quorum for the transaction of business. Process may be served upon the association by serving any officer of the association or by serving the agent designated for service of process. Service of process upon the association shall not constitute service of process upon any individual unit owner.

(b) The association shall have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any common elements therein or accessible therefrom or for making emergency repairs necessary to prevent damage to common elements or to any other unit or units.

(c) The association may purchase units in the condominium and otherwise acquire, hold, lease, mortgage and convey the same. It may also lease or license the use of common elements in a manner not inconsistent with the rights of unit owners.

(d) The association may acquire or enter into agreements whereby it acquires leaseholds, memberships or other possessory or use interests in lands or facilities including, but not limited to country clubs, golf courses, marinas and other recreational

facilities, whether or not contiguous to the condominium property, intended to provide for the enjoyment, recreation or other use or benefit of the unit owners. If fully described in the master deed or by-laws, the fees, costs and expenses of acquiring, maintaining, operating, repairing and replacing any such memberships, interests and facilities shall be common expenses. If not so described in the master deed or by-laws as originally recorded, no such membership interest or facility shall be acquired except pursuant to amendment of or supplement to the master deed or by-laws duly adopted as provided therein and in this act. In the absence of such amendment or supplement, if some but not all unit owners desire any such acquisition and agree to assume among themselves all costs of acquisition, maintenance, operation, repair and replacement thereof, the association may acquire or enter into an agreement to acquire the same as limited common elements appurtenant only to the units of those unit owners who have agreed to bear the costs and expenses thereof. Such costs and expenses shall be assessed against and collected from the agreeing unit owners in the proportions in which they share as among themselves in the common expenses in the absence of some other unanimous agreement among themselves. No other unit owner shall be charged with any such cost or expense; provided, however, that nothing herein shall preclude the extension of the interests in such limited common elements to additional unit owners by subsequent agreement with all those unit owners then having an interest in such limited common elements.

L.1969, c. 257, §15, eff. Jan. 7, 1970.

46:8B-16. Relationship between unit owners and the association.

(a) No unit owner, except as an officer of the association, shall have any authority to act for or bind the association.

(b) Failure to comply with the by-laws and the rules and regulations governing the details of the use and operation of the condominium, the condominium property and the common elements in effect from time to time and with the covenants, conditions and restrictions set forth in the master deed or in deeds of units shall be grounds for an action for the recovery of damages or for injunctive relief or both maintainable by the association or by any other unit owner or by any person who holds a blanket mortgage or a mortgage lien upon a unit and is aggrieved by any such noncompliance.

(c) A unit owner shall have no personal liability for any damages caused by the association or in connection with the use of the common elements. A unit owner shall be liable for injuries or damages resulting from an accident in his own unit in the same manner and to the same extent as the owner of any other real estate.

L.1969, c. 257, §16, eff. Jan. 7, 1970.

46:8B-17. Common expenses

The common expenses shall be charged to unit owners according to the percentage of their respective undivided interests in the common elements as set forth in the master deed and amendments thereto, or in such other proportions as may be provided in the master deed or by-laws. The amount of common expenses charged to each unit shall be a lien against such unit subject to the provisions of section 21 of this act.[1] A unit owner shall, by acceptance of title, be conclusively presumed to have agreed to pay his proportionate share of common expenses

---

1. Section 46:8B-21.

accruing while he is the owner of a unit. However, the liability of a unit owner for common expenses shall be limited to amounts duly assessed in accordance with this act, the master deed and by-laws. No unit owner may exempt himself from liability for his share of common expenses by waiver of the enjoyment of the right to use any of the common elements or by abandonment of his unit or otherwise. The common expenses charged to any unit shall bear interest from the due date set by the association at such rate not exceeding the legal interest rate as may be established by the association or if no rate is so established at the legal rate.

L.1969, c. 257, §17, eff. Jan. 7, 1970.

46:8B-18. Prohibited work

There shall be no material alteration of or substantial addition to the common elements except as authorized by the master deed. No unit owner shall contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions thereto, except through the association and its officers. No unit owner shall take or cause to be taken any action within his unit which would jeopardize the soundness or safety of any part of the condominium property or impair any easement or right appurtenant thereto or affect the common elements without the unanimous consent of all unit owners who might be affected thereby.

L.1969, c. 257, §18, eff. Jan. 7, 1970.

No. 83-439

In The

Supreme Court of the United States

October Term, 1983

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife; FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single,

Petitioners,

and

HARMON COVE CONDOMINIUM II ASSOCIATION, INC.,
Intervenor,

vs.

HARTZ MOUNTAIN ASSOCIATES, a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Respondents.

BRIEF FOR RESPONDENT HARTZ MOUNTAIN ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether or not this Court has jurisdiction pursuant to 28 U.S.C. §1257(3); and

2. Whether or not review should be granted pursuant to U.S. Sup. Ct. R. 17.

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CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

U.S. Const. Art. I, §10, Cl. 1 and the Fourteenth Amendment, §1 (in pertinent part) appears at page 3 of the petition for writ of certiorari.

N.J. Const. Art. I, §1:

"All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

28 U.S.C. §1257(3):

"By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, . . . of the United States, . . ."

N.J. Stat. Ann. §§46:8B-1 *et seq.*, appears at page 54a of the appendix to the petition for writ of certiorari.

U.S. Sup. Ct. R. 17.1(b), (c):

"1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. . . .

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

STATEMENT OF THE CASE

This respondent hereby adopts the Statement of the Case set forth in the opinion of the Supreme Court of New Jersey and appearing at pages 2a-4a of the appendix to the subject petition for writ of certiorari.

This respondent also regards pages 1a-41a and 47a-53a of the appendix to the subject petition for certiorari as a complete and accurate reproduction of those portions of the record below which are material to the consideration of the questions presented for review, while regarding the oral arguments of counsel for petitioners, albeit accurately transcribed at pages 42a-46a of said Appendix, as forming no part of the record for the purpose of determining whether or not a federal question had been timely and properly raised below. *See Zadig v. Baldwin*, 166 U.S. 485 (1897).

This respondent makes no independent reference to the record below as material to the questions presented for review inasmuch as it is unaware of any recitation or discussion of a federal question contained therein.

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction pursuant to 28 U.S.C. §1257(3) because no federal question was decided below,

the record revealing that petitioners did not raise a federal question in a timely and proper manner and that none was expressly or impliedly addressed by any of the courts below, each of which grounded their respective judgments in opinions which interpreted and applied the subject state statute as if its presumption of validity had never been challenged.

Petitioners did not forge any challenge to the constitutional validity of the statutory construction favored by respondents while before the trial court, and those challenges supposedly couched in their briefs to the New Jersey Appellate and Supreme Courts invoke the authority of the New Jersey Constitution as readily as they do the Constitution of the United States.

Thus, to the extent that a judgment which silently applies a *prima facie* presumptively valid statute would otherwise be deemed by this Court to have decided in favor of the kinetic constitutional validity of said statute by necessary implication, this respondent then contends that the judgment of the New Jersey Supreme Court in the case at bar in fact rested upon adequate and independent state grounds in that it either treated the question of constitutional validity as having been waived by lack of timely presentation at the trial level in accordance with legitimately and consistently applied state procedure, or as having been raised within the context of New Jersey constitutional provisions governing but not prohibiting the intended application of the statute.

2. Assuming that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3), there are no special and important reasons to compel this Court to exercise its judicial discretion in favor of review pursuant to U.S. Sup. Ct. R. 17 because the New Jersey Supreme Court has not decided a federal question in a way which conflicts with decisions of other state courts of last resort or with applicable decisions of this Court.

The decision of the New Jersey Supreme Court in the case at bar, like those of other state courts of last resort having had occasion to consider the standing of individual condominium owners versus condominium associations, was based upon an interpretation of state statutory provisions and court rules governing local procedure in such cases made and provided. Like the New Jersey Supreme Court, none of the other state courts of last resort expressed their decisions in terms of federal constitutionality and the conflict among them, if any, arises purely from legitimate differences in the exercise of legislative police powers and judicial supervisory powers peculiar to each of the states which this Court has repeatedly recognized as consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; such that petitioners' claims of constitutional violations do not rise to the level of substantiality necessary to compel review by this Court.

REASONS FOR DENYING THE WRIT

I.

THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. §1257(3) BECAUSE THE DECISION BELOW RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The subject petition for certiorari dictates that this Court's power to review the final judgment rendered by the Supreme Court of New Jersey in the case at bar depends exclusively upon whether or not the validity of the New Jersey Condominium Act, N.J. Stat. Ann. §§46:8B-1 *et seq.* (West, 1983), was drawn in question on the ground of its being repugnant to the Constitution of the United States. 28 U.S.C. §1257(3) (LCP, 1977). Although no particular form of words or phrases is essential to obtain this

end, the record must clearly show that a claim of invalidity and the ground therefor was brought to the attention of the state court with fair precision and in due time. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 580 (1969); *Webb v. Webb*, 451 U.S. 493, 496-499 (1981). Such was not the case here.

Petitioners' own references to the record below fail to clearly demonstrate that their present claims of constitutional infirmities were brought to the attention of the trial court with fair precision (40a). Indeed, the trial court opinion directly responded to petitioners' broadly couched argument by focusing upon the proper construction to be given to the Condominium Act and not upon whether such construction was in any way repugnant to the Constitution of the United States (27a-28a), and the judgment of the trial court was affirmed by the Appellate Division *per curiam* on opinion below (18a) despite the fact that petitioners had made reference to "equal rights" and "due process of law" in their appellate brief (47a-50a).

Petitioners' first legitimate reference to the Constitution of the United States was coupled with the New Jersey Constitution in a portion of its petition to the New Jersey Supreme Court wherein due process and equal protection were briefly discussed as protections provided by both Constitutions (52a). No express or implied reference to the constitutional provision prohibiting state laws impairing the obligation of contracts, U.S. Const. Art. I, §10, cl. 1, was ever placed upon the record below.

Had the New Jersey Supreme Court expressly decided that the New Jersey Condominium Act passed United States constitutional muster, then the question whether petitioners had timely and properly raised the issue on the record below would be of no moment. *Charleston Federal Savings & Loan Asso. v. Alderson*, 324 U.S. 182, *reh. den.*, 324 U.S. 888 (1945). However,

the conspicuous absence of any reference to the Constitution of the United States in the decision of that Court causes the method of petitioners' constitutional challenges to bear heavily upon the critical question whether the New Jersey Supreme Court based its decision upon adequate and independent state grounds which would thereby deprive this Court of jurisdiction. *See, e.g., Stembridge v. Georgia,* 343 U.S. 541 (1952).

It is a well-settled principle of New Jersey procedural law that appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available, unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest. *Nieder v. Royal Indemnity Insurance Co.,* 62 N.J. 229, 234, 300 A. 2d 142 (1973); *see, e.g., Cox v. Valley Fair Corp.,* 83 N.J. 381, 386-387, 416 A. 2d 809 (1980).

A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. *Williams v. Georgia,* 349 U.S. 375, 382-383 (1955). Indeed, the failure to present a federal question in conformance with state procedure constitutes an adequate and independent state ground of decision barring review in this Court, so long as the state has a legitimate interest in enforcing its procedural rule. *Michigan v. Tyler,* 436 U.S. 499, 512 at n.7 (1978); *Hathorne v. Lovorn,* 457 U.S. 255 (1982).

It should be clear, then, that this Court is without power to decide whether petitioners' constitutional rights have been violated since those rights were not raised in accordance with established New Jersey practice, *see, e.g., Copperweld Steel Co. v. Industrial Com.,* 324 U.S. 780 (1945); *Edelman v. California,* 344 U.S. 357, 358-359 (1953), the failure of the New Jersey Supreme Court to discuss the same calling for this Court's exercise

of judicial discretion in favor of the abstentionary presumption that the judgment in this case rested upon state rather than federal grounds. *Cf., Lynch v. New York,* 292 U.S. 52 (1934); *Durley v. Mayo,* 351 U.S. 277 (1956); *Black v. Cutter Laboratories,* 351 U.S. 292 (1956).

A parallel presumption pertains where, as here, petitioners' ultimate references to due process and equal protection were made in connection with both the United States and New Jersey Constitutions, *see* N.J. Const. Art. I, Sec. 1, cl. 1; *see generally, Horsman Dolls v. Unemployment Compensation Commission,* 7 N.J. 541, 82 A. 2d 177 (1951), *appeal dismissed,* 342 U.S. 890; *Peper v. Princeton University Bd. of Trustees,* 77 N.J. 55, 389 A. 2d 465 (1978) and the judgment of the New Jersey Supreme Court, by its silence, could have as readily rested upon the latter as upon the former. *Cf., Zadig v. Baldwin,* 166 U.S. 485 (1897); *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.,* 228 U.S. 326, *reh. den.,* 228 U.S. 596 (1913); *Mental Hygiene Dept. of Cal. v. Kirchner,* 380 U.S. 194 (1965).

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW PURSUANT TO U.S. SUP. CT. R. 17.

A. There is no interstate conflict of decisions about a federal question.

Just as jurisdiction arises only if implications of constitutional validity must be derived from the New Jersey Supreme Court judgment otherwise silent on the subject, U.S. Sup. Ct. R. 17.1(b) can be invoked only if contrary implications are necessarily derived from the equally silent judgments of the other state courts of last resort relied upon by petitioners (Petition at pp. 19-21); that rule

regarding such conflicts in constitutional decision-making as material to the question whether or not there exist special and important reasons for a discretionary grant of review by this Court.

However, petitioners' argument in favor of the existence of such a conflict cannot withstand analysis, for each of those state courts which gave standing to condominium unit owners expressly did so because they found that their respective state rules of local procedure so provided and not because a contrary interpretation of such rules would have proven unconstitutional. Reasoning of the latter respect would have required equal expression and would have, in any event, transcended those boundaries of judicial review firmly established by the immutable doctrine of abstention (citations too numerous to mention).

B. The New Jersey Supreme Court has not decided a substantial federal question unsettled by or in conflict with decisions of this Court.

This Court's power over state courts is confined to the correction of erroneous adjudications of federal rights. It is not in the business of rendering advisory opinions. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). Jurisdiction should therefore be exercised only when the federal questions presented for review are real and substantial, *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 596 (1913); *Zucht v. King*, 260 U.S. 174 (1922); *Wick v. Chelan Electric Co.*, 280 U.S. 108 (1929), characteristics not apparent herein.

An individual may lack standing under the prudential principles by which the judiciary seeks to limit access to the courts to those litigants best suited to assert a particular claim. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979). For example, in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), it was held that an association has standing to bring

suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and, (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members, 432 U.S. at 342-343, *citing Warth v. Seldin*, 422 U.S. 490, 499 (1975).

It was just such a policy of judicial procedure which embodied the opinion in *Crescent Pk. Tenants Asso. v. Realty Eq. Corp. of N.Y.*, 58 N.J. 98 (1971) and which the New Jersey Supreme Court found to be favorably inherent in the New Jersey Condominium Act (9a). Thus, its judgment in the case at bar can hardly be said to pose a substantial conflict with the decisions of this Court or to raise a federal question of sufficient novelty or import to warrant this Court's attention.

i. The adoption of the New Jersey Condominium Act did not impair the obligations of contract between petitioners and this respondent.

Ignoring for a moment the fact that the impairment of contractual obligations was never raised in arguments anywhere below, review and application of the case law interpreting U.S. Const. Art. I, Sec. 10, cl. 1, not only reveals the frivolous nature of such a claim, but serves as an important prelude to the consideration of due process and equal protection principles.

Because the ownership of New Jersey condominiums is governed by the statute under which this respondent planned, designed and developed the subject Harmon Cove complexes, petitioners' rights thereto perforce arose subsequent and subject to said statute. *See* Petition at page 3-4; N.J. Stat. Ann., §§46:8B-1 *et seq.*

However, the inhibition of the Contract Clause is wholly prospective, *i.e.*, only those contracts in existence when the hostile law is passed are protected from its effect, *Denny v. Bennet*, 128 U.S. 489 (1888); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), whereas contracts made subsequent to an enactment of a statute are subject to its terms, *see Denny v. Bennet, supra; Blackstone v. Miller*, 188 U.S. 189 (1903); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Wood v. Lovett*, 313 U.S. 361 (1941), and to the construction given them by the highest state court. *Louisiana v. Pilsbury*, 105 U.S. 278 (1882).

Moreover, a vested property right of statutory origin is not a contract right subject to the Contract Clause, *Crane v. Hahlo*, 258 U.S. 142 (1922), and purchases governed by statute are not impaired by amendments to that statute, *Veix v. Sixth Ward Bldg. and Loan Asso. of Newark*, 310 U.S. 32 (1940); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Nor are contractual obligations entered into on the faith of a certain construction of a statute impaired by a different construction given to the statute by the state's highest court. *Fleming v. Fleming*, 264 U.S. 29 (1924).

Thus, petitioners' present claims of contract impairment are contrary to this Court's controlling case law and to the New Jersey Supreme Court's construction of the Condominium Act itself, whereby the protection of common element ownership rights created and arising thereunder is exclusively entrusted to the statutorily mandated associations designed for such purposes (5a-14a).

Indeed, when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the state to safeguard the vital interests of its people is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated

private contract constitutionally immune from impairment. *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232 (1945); *see, e.g., Home Building and Loan Asso. v. Blaisdell*, 290 U.S. 398 (1934); *Honeyman v. Hanan*, 302 U.S. 375 (1937).

ii. Petitioners have not been deprived of equal protection of law.

The Equal Protection Clause directs that all persons similarly circumstanced should be treated alike, but does not require that things which are different in fact or opinion be treated in law as if they were the same. The initial discretion to determine what is different and what is the same resides in the Legislature of the states. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns, both public and private, and that account for limitations on the practical ability of the state to remedy every ill. In applying the Equal Protection Clause to most forms of state action, this Court thus seeks only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202 (1982).

As construed by the New Jersey Supreme Court, the New Jersey Condominium Act is one such form of legitimate state action inasmuch as it rationally distinguishes condominium common element ownership from purely individual forms of real estate ownership for the purpose of promoting the economical, expedient, judicial administration and resolution of disputes arising out of such ownership (8a-14a), for the Equal Protection Clause does not exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. *See Dohany v. Rogers*, 281 U.S. 362, 369 (1930); *Gibbes v. Zimmerman*, 290 U.S. 326 (1933).

For example, in *G.D. Searle & Company v. Cohn*, 455 U.S. 404 (1982), it was held that N.J. Stat. Ann. §2A:14-22, which tolls the limitation period for an action against a foreign corporation which is amenable to jurisdiction but has no agent for service in New Jersey, does not violate the Equal Protection Clause because of the existence of a rational basis for treating such corporations differently from others due to the difficulty in effectuating lawful service of process upon them. *See also, e.g., American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976) (upholding venue statute); *Lindsey v. Normet*, 405 U.S. 56 (1972) (upholding statute limiting time within which to bring actions based upon out-of-state judgments); *Jones v. Union Guano Co.*, 264 U.S. 171 (1924) (upholding conditions precedent to institution of certain types of litigation).

iii. Petitioners have not been deprived of due process of law.

Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Representing a profound attitude of fairness, due process is compounded of history, reason, the past course of decisions and strict confidence in democracy. *Ingraham v. Wright*, 430 U.S. 651, 675 (1977). It is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The Due Process Clause raises no impenetrable barrier to the taking of a person's possessions. Procedural due process rules are meant to protect persons not from deprivations, but from the mistaken or unjustified deprivation of life, liberty or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that procedural due process rules are shaped by the risk of error inherent in the truth finding process. *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

Due process is a term that negates any concept of inflexible procedures universally applicable to every imaginable situation. Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the state's interest in a particular procedure for making it. *Hortonville District v. Hortonville Education Asso.*, 426 U.S. 482, 494 (1976); *Schwelker v. McClure*, 456 U.S. 188 (1982); *see, e.g., Benz v. New York State Thruway Authority*, 369 U.S. 147 (1962).

The Due Process Clause does not guarantee to the citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Dohany v. Rogers*, 281 U.S. 362, 369 (1930); *Gibbes v. Zimmerman*, 290 U.S. 326 (1933); *Honeyman v. Hanan*, 302 U.S. 375 (1937).

The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adopted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary and the procedure it adopts satisfies the requirements of reasonable notice and opportunity to be heard. The requirements of the Fourteenth Amendment are met if a substitute remedy is substantial and efficient. *Hardware D. Mt. F. Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158-159 (1931).

According to the New Jersey Supreme Court, the New Jersey Condominium Act, N.J. Stat. Ann. §46:8B-1, *et seq.*, in conjunction with other applicable state procedural rules, collectively assigns condominium common element owner redress rights to the responsibility of a single association specifically

designed to safeguard such rights, while providing no bar to an owner's challenge to the exercise of that responsibility by the association, nor to the institution of individual suits based upon the exclusive ownership of a condominium unit (5a-16a). So construed, the Act represents an exemplary accommodation of both individual and state interests consistent with the aforestated principles of due process and presents no substantial federal question requiring review by this Court.

CONCLUSION

For all of the foregoing reasons, this respondent respectfully requests that the subject petition for writ of certiorari be denied for lack of jurisdiction, declined for lack of special and important reasons or summarily dismissed for failure to satisfactorily demonstrate a violation of the United States Constitution.

Respectfully submitted,

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STATEMENT OF THE CASE

Respondent, Hartz Mountain Associates is the developer of certain residential condominiums located in Secaucus, New Jersey, known as Harmon Cove I and Harmon Cove II. Petitioners are five individual condominium owners in the Harmon Cove I development, which includes a total of 351 townhouse type units. The legal structure and organization of the development is in accordance with, and subject to, the New Jersey Condominium Act, N.J.S.A. 46:8B-1 *et seq.*

Respondent, Harmon Cove I Condominium Association is a non-profit corporation organized pursuant to Title Fifteen of the New Jersey Revised Statutes. Its membership is comprised of the 351 unit owners of Harmon Cove I, including the individual petitioners herein.

The By-laws of the Harmon Cove I Condominium Association grants membership automatically to each unit owner. The broad purposes of the Association are to administer and manage the condominium in accordance with its Certificate of Incorporation, By-laws and the Condominium Act.

The second stage of the development is managed by the Harmon Cove II Condominium Association, similarly organized.

In addition, in conjunction with the development of these condominiums, Hartz Mountain Associates caused to be created an additional non-profit corporation, known as Harmon Cove Recreation Association. Its membership is comprised of all of the unit owners of both Harmon Cove I and Harmon Cove II. Hartz Mountain Associates then conveyed to the Harmon Cove Recreation Association a fee simple interest in the recreation facilities and certain "community" facilities appurtenant to both developments. According to its Certificate of Incorporation its

function is to ". . . administer, manage, maintain, repair and operate . . ." the facilities which *it owns* for the benefit of its membership.

Accordingly, the issues in this case had to be considered in light of the three distinct ownership interests created under the master condominium deed, the individual deeds, and the organizational structure of the condominium. First, the individual's fee ownership of his specific unit; second, the individual owner's undivided interest as a tenant-in-common in the so-called common elements of the development; and, finally, the ownership in fee by the Harmon Cove Recreation Association of certain recreational and communal facilities for the benefit of its members.

All of these relationships are clearly defined in the master deed, the offering plan and related disclosure documents, which are mandated to be furnished to all prospective purchasers of units. No allegation that such disclosures were less than adequate has been raised.

The respective Boards of Directors of the Harmon Cove I Condominium Association and the Harmon Cove Recreation Association, in discharge of their responsibilities, undertook to negotiate with the developer, Hartz Mountain Associates, to have certain construction deficiencies in the common areas and recreation and community facilities rectified or the cost thereof borne by the developer.

After lengthy negotiations, a proposed settlement was arrived at, the merits of which were not before the New Jersey Supreme Court. The settlement did call for the Associations to grant releases for all claims relating to such common facilities.

Prior to consummation of the proposed settlement, petitioners commenced this action in the Chancery Division of the Superior

Court of New Jersey seeking to enjoin the settlement, and seeking to obtain redress individually for the same matters which were the subject of the settlement. In addition, and highly significant, petitioners alleged that the same damage had been sustained by all unit owners, and that these petitioners should be certified as representing a class comprised of such unit owners.

The trial court granted respondents' motion to dismiss all claims against the developer, and recognized the Associations' authority to settle the matter on behalf of the unit owners, or standing to sue should such settlement abort.

The Appellate Division of the Superior Court of New Jersey affirmed.

Thereafter, the New Jersey Supreme Court affirmed. It found that the Associations had the exclusive right and standing to pursue relief for damages to the common elements by third parties.

Specifically, the court found, "Obviously, the unit owner has an interest in claims against the developer arising out of damages to or defects in the common elements. However, the Association has been charged with and delegated the primary responsibility to protect those interests . . . So long as it carries out those functions and duties, the unit owners may not pursue individual claims for damages to or defects in the common elements predicated upon their tenant-in-common interest." 93 N.J. at 370 (Pet. App. 11a).

The court, however, clearly reserved to the unit owners the right to seek relief for any injury to their individual unit, whether direct, or indirect as a result of defects in the common area. The court further left open causes of action in the nature of derivative suits to members of the Association should it fail to act on their behalf. Finally, the court reaffirmed the ever present right of the

membership to challenge the actions of its elected representatives should there be a breach of the fiduciary relationship.

REASONS FOR DENYING THE WRIT

I.

The petition presents no federal constitutional issue and no question of federal law for review.

Despite petitioners' labored selection of isolated phrases from its pleading and briefs, a fair reading thereof demonstrates that no question of federal constitutional law was presented to or argued in the New Jersey courts.

The closest that petitioners came to doing so, appears on the very last page of petitioners' brief in the New Jersey Superior Court (relied upon in the Supreme Court) that, "Any other rule would deprive condominium property owners of property rights without due process of law." (Pet. p. 8). This conclusory assertion was not preceded by any argument directed to the point, nor any citation supporting the same. All other references to a latent constitutional issue were effectively disguised, and surface for the first time in this petition for certiorari.

While this Honorable Court is not bound by the failure of the highest court of New Jersey to recognize or decide a constitutional issue, such issue must have been properly presented to the state court and in such manner that it was necessarily decided by that court. If not so presented then this Court will not consider it. *Street v. New York,* 394 U.S. 576 (1969).

In addition, where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the

aggrieved party can affirmatively show the contrary. *Street v. New York, supra* at 582; *Bailey v. Anderson,* 326 U.S. 203 (1945).

Petitioners have not carried that burden.

It is noted in the petition that the Attorney General of the State of New Jersey was served with a copy of the petition for writ of certiorari herein, pursuant to Rule 28.4(c) and 28 U.S.C. §2403(b) (Pet. p. iii). No such service was accomplished on the Attorney General in the state court proceeding despite a rule of comparable import in New Jersey. N.J. Rule 2:5-1(h).

A reading of the opinion of the New Jersey Supreme Court clearly demonstrates that the case presented to and decided by it was exclusively concerned with an interpretation of New Jersey's comprehensive Condominium Act, N.J.S.A. 46:8B-1, and the functional structure of the various documents embodying petitioners' rights as unit owners in the condominium.

The decision focusing on such state law concepts as "standing to sue", "real party in interest", and substantive real estate law, reaches a commendable result which harmonizes and protects the individual unit owner's rights and the associations' rights, while promoting judicial efficiency consistent with prior state practice. *See Crescent Pk. Tenants Association v. Realty Eq. Corp.,* 58 N.J. 98 (1971). As such, it is submitted that no federal question has been presented for review or exists, and, accordingly, the writ prayed for should be denied.

II.

Petitioners have not been denied equal protection of laws.

It is difficult to conceive that the ruling of the New Jersey Supreme Court in this matter, granting the exclusive primary right

to a condominium association to enforce claims for damages to the common elements of a condominium, is a denial of equal protection to the individual unit owners.

A state may set the terms upon which it will permit litigants and litigations in its courts, and, provided the same has some rational basis, it will not be in violation of the Fourteenth Amendment equal protection dictate. *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1949).

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so desperate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. St. Louis,* 347 U.S. 231 (1953).

New Jersey has recognized that different ownership interests in property may form the basis for valid classification, and not violate the equal protection mandate. *Airwick Industries, Inc. v. Carlstadt Sewerage Auth.,* 57 N.J. 107 (1970); *Dome Realty, Inc. v. Paterson,* 83 N.J. 212 (1980).

Both the New Jersey legislature, in adoption of the Condominium Act, and the New Jersey courts have recognized that condominium form of ownership is inherently different than traditional fee ownership of real estate, and justifies desperate treatment. *See Papalexion v. Tower West Condominium,* 167 N.J. Super. 516 (Sup. Ct. Ch. Div. 1979), where the Court recognized that in condominium ownership, as in any group endeavor, a certain degree of individualism and individual rights must be subordinated to the common interest. Having selected the

condominium form of ownership, petitioners need recognize that they must relinquish a certain degree of freedom and independent action that they might otherwise enjoy with separate, privately owned property. *Hidden Harbour Estates v. Norman,* 309 So. 2d 180 (Fla. Dis. Ct. App. 1975).

It is respectfully submitted that condominium ownership is a valid class or category of real estate ownership, and supports the imposition of reasonable restrictions on the enforcement of rights shared in common with all other such owners. Accordingly, petitioners' equal protection argument must fail.

III.

The recognition of an exclusive right in the Condominium Association to sue for damages for injury to the common elements does not violate the constitutional prohibition of impairment of contracts.

Petitioners allege that the effect of the New Jersey Supreme Court decision is to violate the United States Constitution prohibition that, "No State shall . . . pass any . . . law impairing the Obligations of Contracts. . . ." U.S. Const. Act I, §10 Cl. 1. Petitioners misconstrue the nature of their contracts, and misapply the constitutional mandate.

Each prospective purchaser of a unit in the Harmon Cove I Condominium was furnished, in accordance with applicable law, a document entitled "Offering Plan for Harmon Cove I Condominium", dated October 24, 1975. Among other matters such Plan contained specimen copies of the purchase agreement they were later to execute, the unit deed, the master deed, the By-laws of the Condominium Association, the by-laws of the Recreation Association, as well as a detailed description of units and the common elements. The individual contracts provided that,

"The Unit is sold and is to be conveyed subject to the provisions of, and all matters set forth in or referred to by the Condominium Act, the Master Deed or a certain Offering Plan . . . all of which are incorporated herein by reference and made a part of this Agreement with the same force and effect as if set forth in full herein." Unit owners' deeds likewise incorporate the Condominium Act, and all declarations and restrictions contained in the master deed as well as the declaration in respect of certain community facilities. Finally, upon acceptance of membership in the Condominium Association and the Recreation Association, unit owners agree to be bound by the by-laws of those associations.

While the New Jersey Supreme Court recognized the unit owners' interest in the common elements, it found that the responsibility to protect those interests had been delegated by statute to the Association. *See* N.J.S.A. 46:8B-14, "the association . . . shall be responsible for the maintenance, repair, replacement, cleaning, and sanitation of the common elements"; N.J.S.A. 46:8B-18, "No unit owner shall contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions thereof, except through the association and its officers."

A fair reading of these restrictions supports the New Jersey court's conclusion that the Association has the primary responsibility to seek reimbursement for damages to the common elements from third parties, including the developer. Accordingly, the remedy which petitioners complain they are deprived of, is actually surrendered in their "contract". Their contract must be viewed as incorporating this statutory and organizational framework.

Having agreed to delegate the enforcement of violations of their interest in the common elements to their Association, they cannot complain that the court's recognition thereof is an

impairment of their contractual rights. Clearly not in a constitutional sense.

The federal constitutional prohibition embodied in Article 1 §10 is directed exclusively against state legislative action, and not court judgments. *Barrows v. Jackson,* 346 U.S. 249 (1953). And, while a statutory deprivation of a remedy to enforce contractual obligations might fall within the prohibition, reasonable conditions attached to the remedy fall short thereof. *Giffes v. Zimmerman,* 290 U.S. 326 (1933).

The New Jersey Supreme Court was careful to point out that petitioners, as unit owners, maintain individual rights to pursue damages to their units, including those sustained as a result of infirmities in the common elements. Equally significant they may, as is concurrently taking place in this action, challenge the performance of their elected Association representatives. Finally, should their representatives fail to act, they (the unit owners) may sue in the form of a derivative action.

In view of the consensual nature of the manner of dealing with the common elements embodied in the form of ownership chosen by the unit owners, and the entire scheme of remedies available to redress injury to the common elements, it is specious for petitioners to assert that the New Jersey legislature has unconstitutionally impaired a contractual obligation.

IV.

The New Jersey Supreme Court has not decided a federal question contrary to other state courts of last resort.

Petitioners allege that the writ should be granted under Rule 17.1(b) because the New Jersey Supreme Court has decided the same question as other state courts in a manner in conflict with

such courts. Petitioner frames this common issue as the "rights of unit owners to sue developer on contract for non-performance; breach of warranty, etc. as to residential units *and* as to common elements appurtenant thereto." (Pet. p. 19).

No single case relied upon by petitioners holds that failure to afford individual unit owners standing to sue would deprive them of any federal constitutionally protected right. Equally significant for purposes of this petition, no other state court facing this issue found a federal question worthy of addressing in its published opinion.

This line of cases relied upon by petitioners are principally represented by *Friendly Village Community Assoc., Inc. v. Silva & Hill Const. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973); *Ruberstien v. Burleigh House, Inc.*, 305 So. 2d 311 (Fla. Dist. Ct. App. 1974); *Deal v. 999 Lake Shore Ass'n*, 94 Nev. 301, 579 P. 2d 775 (1978). The holdings in these cases are more representative of a denial of the right to prosecute a claim by the condominium associations under then local law, than supportive of an unrestricted right to bring suit by individual unit owners. The trial court in the instant case aptly reflected that "The cases [from other jurisdictions] upon which plaintiffs rely arose under early condominium statutes which were silent as to the right of the association to sue on behalf of unit owners; finding no specific authority granted to the association, courts relied on strict local pleading rules to find that claims must be prosecuted by the real parties in interest, that is, the unit owners themselves." (Pet. App. 28a).

Where local legislation or standing rules have been found to permit an association to sue, suits by such associations on behalf of unit owners for damage to common elements have been sustained. In some cases these holdings overturned earlier holdings which pre-dated such legislation or court rule. *See Governor's*

Grove Condominium Ass'n. v. Hill Development Corp., 404 A. 2d 131 (Conn. Super. Ct. 1978); *1000 Grandview Ass'n. v. Mt. Washington Associates*, 434 A. 2d 796 (Pa. Super. Ct. 1981); *Wittington Condominium Inc. v. Braener Corp.*, 313 So. 2d 463 (Fla. Dist. Ct. of App. 1975). *See also*, Calif. Stats. 1976, Ch. 585, Section 2, expressly overruling the *Friendly Village* case, *supra.*

While courts in jurisdictions other then New Jersey (not necessarily courts of last resort) have reached a result contrary to the New Jersey Supreme Court herein, such result was not, and properly should not have been, predicated upon application of federal constitutional principles.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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